

REPORTS
OF
C A S E S

DETERMINED IN THE



Court of Sudder Dewanny Adawlut,

WITH

T A B L E S

OR THE

NAMES OF THE CASES AND PRINCIPAL MATTERS.

A NEW EDITION.

BY THE REGISTER OF THAT COURT.

VOLUME IV.

CONTAINING

SELECT CASES OF 1825, 1826, 1827, 1828, AND 1829.

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J U D G E S
OF THE
Court of Sudder Dewanny Adulut
PRESENT
DURING THE PERIOD OF THESE REPORTS.

IN 1825.

COURTNEY SMITH, Officiating Chief Judge.
WILLIAM BYAM MARTIN, Judge.
CUTHBERT THORNHILL SEALY, Ditto.
HENRY SHAKESPEAR, Ditto.
ALEXANDER ROSS, Ditto.

IN 1826.

WILLIAM LEYCESTER, Chief Judge.
COURTNEY SMITH, Judge.
CUTHBERT THORNHILL SEALY, Ditto.
WILLIAM DORIN, Ditto.
ALEXANDER ROSS, Ditto. "

IN 1827.

WILLIAM LEYCESTER, Chief Judge.
COURTNEY SMITH, Judge.
WILLIAM DORIN, Ditto.
C. T. SEALY, Ditto.
ALEXANDER ROSS, Ditto.
Sir J. E. COLEBROOKE, Bart., Ditto.

IN 1828.

WILLIAM LEYCESTER, Chief Judge.
C. T. SEALY, Judge.
ALEXANDER ROSS, Ditto.
R. H. RATTRAY, Ditto.
WILLIAM BLUNT (Arracan), Ditto.
M. H. TURNBULL, Ditto. "

IN 1829.

WILLIAM LEYCESTER, Chief Judge.
ALEXANDER ROSS, Judge.
C. T. SEALY, Ditto.
WILLIAM BLUNT, Ditto.
R. H. RATTRAY, Ditto.
M. H. TURNBULL, Ditto.

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C A S E S

IN THE

COURT OF

S U D D E R D E W A N N Y A D A W L U T.

BABOO RAM DAS (Heir of BABOO MUKUND LAL, deceased),
and BABOO BUSUNT SINGH (Heir of BABOO DYAL SINGH,
deceased), Appellants, 1825.
Jan. 5th.

versus
THE COLLECTOR OF BENARES, Respondent.

THIS action was instituted in the Benares Provincial Court The treasury on the 12th of April 1814, by the Collector of Benares, to recover surers of a from Baboo Mukund Lal, *Khizanchee* of the *Sircarée* treasury, and Collector held responsible from Baboo Dyal Singh, *Khizanchee* of the *Moolkee* treasury, the sum of 5,717 rupees, under the following circumstances: On for a sum the morning of the 30th of November 1819, when the *treasury* of money, of the Collectors was opened, it was discovered said to have been that a *nukub*, or hole, had been cut through the floor, and stolen from that the sum of 5,717 rupees was missing. The treasure chest the treasury in which the money had been deposited was not locked: but surely under had evidently not been opened by violence: two empty money bags their charge. and a quantity of false coin were found in the room. After mature deliberation on the circumstances of the case, and the evidence taken before the Foujdaree Adawlut of the city of Benares, the Magistrate recorded his opinion on the case as follows: the *nukub* could not have been cut but from the inside, or by strangers, or by the sepoys of the guard: the theft must, for the following reasons, have been perpetrated by some persons well acquainted with the premises: first, because it appeared from an inspection of the room that the *nukub*, which was in the floor, had not been a little further from the wall, would have been directly under one of the chests: so that it must have been cut in the inside; secondly, had common thieves entered through the *nukub* from the outside, they would not have left the two empty bags, as the removing the cash from one bag to another could not be done without some noise, which might have been overheard; thirdly, common thieves would have been unable to distinguish good from bad coin, and would have carried off all they could lay their hands on; and lastly, had the money been taken by strangers, the chests must have been forced open, whereas, though open, they were found unlocked. For these and other reasons set forth in his proceedings, he considered the sepoy guard exculpated from all blame (the outer door having

CASES IN THE SUDDER DEWANNY ADAWLUT.

1825. been found locked as usual): but thought that a very strong suspicion existed against the *gomashtas* and other servants of the treasurers. As, however, there was not sufficient proof against any individual to warrant a hope of conviction, he did not make over the case to the Court of Circuit; but left it to the revenue authorities to determine whether the missing sum was to be credited in the public account or not. A full report of the case having been submitted to Government by the revenue authorities, the Collector was ordered to institute a suit against the treasurer for the recovery of the said sum. He accordingly instituted the present action against both the defendants, whom he held equally responsible, as they had equal access to the treasury through their respective *gomashtas*.

Each of the defendants denied his individual responsibility, and endeavoured to throw the responsibility on the other.

Baboo Dyal Sing pleaded, that the duty of the *gomashtas* of the *moolkee* treasurer was merely to enter into their accounts the payment of any sums on account of the public revenue due on the estates of the Raja of Benares: but that the money was received and placed in the treasure chests by the *gomashtas* of the *sircaree* treasurer; and the *gomashtas* of the *moolkee* treasurer had nothing to do with the safe custody of the money; that, on two former occasions, when the sums of 3,500 and 675 rupees were missing, Mukund Lal, holding himself responsible, traced the theft of the first sum to the sepoy of the guard, and having prosecuted them to conviction in the Criminal Court, received the amount which had been recovered under a receipt signed by himself, and paid it into the Collector's treasury: and replaced the second sum from his private funds, taking a bond for the same from his *rakuree* or cashkeeper. Baboo Mukund Lal, on the contrary, pleaded that the *gomashtas* of Baboo Dyal Sing, the *moolkee* treasurer, had the custody of the money, his *gomashtas* having only to keep accounts of the receipts and disbursements; and that in the two instances above noticed, though Baboo Dyal Singh was the responsible person, he considered it his duty, as a public servant of Government, to exert himself to save the Government from loss. Both the defendants pleaded, that let the person whose duty it was to keep the cash be who he might, it was unjust to call upon them to replace the money stolen; as their *gomashtas*, having counted the bags before the sepoy, and locked the doors on the eve of the night of the theft, their responsibility ceased; the safe custody of the property being then the duty of the sepoy guard.

Before the case came to a final hearing, Baboo Dyal Singh died, and was succeeded by his son and heir Baboo Busunt Singh, who defended the suit in his room.

The Senior Judge of the Court (W. A. Brooke), after hearing the pleadings and evidence of the parties, and perusing the proceedings held on this case in the Foujdaree Court, concurred with the City Magistrate in thinking that the burglary must have been committed by persons well acquainted with the premises, and that it could not have been committed from the outside by strangers, or by the sepoy of the guard; and as it appeared in evidence, that the

gomashtras of both the defendants had keys of the locks on the treasure chests and outer door of the treasury, and had equally free access to the treasury, he held them jointly and severally answerable. He accordingly passed a judgment in favour of the Collector, and decreed that the defendants should pay into the public treasury the sum of 5,717 rupees. The costs of suit were charged to the defendants.

1825.

Baboo Ram Das
and others,
v. The Col-
lector of
Benares.

The defendants preferred separate appeals from this decision to the Sudder Dewanny Adawlut, and on the death of Baboo Monkund Lal, Baboo Ram Das, his son and heir, appealed to carry on the appeal. The pleas of appeal were similar to those urged by the appellants in the Provincial Court.

On mature consideration of the proceedings, the Court (present C. Smith, Second Judge) seeing no sufficient reason for altering the decision of the Provincial Court of Benares, confirmed it, on the 5th of January 1825, and dismissed both the appeals with costs.

PRAN KISHEN DUTT, Appellant,
versus

1825.

THE COLLECTOR OF THE TWENTY-FOUR PARGUNAS, Respondent. Jan. 6th.

THE Collector of the Twenty-four Pergunnas instituted this action in the Zillah Court of the same district, against Pran Kishen Dutt and Shunkuree Dossea, a neighbouring zamindar, under the provisions of regulation 49, 1793, to obtain an order for the confiscation of a parcel of land situated in Chuk Nurayun Khatta, containing about 100 beegas of land. The land in question being claimed by both the defendants, had been the occasion of disputes, which ended in breaches of the peace. A serious affray, in which some persons were wounded, having taken place regarding the possession of the said land on the 17th November 1815, the Magistrate committed the actual rioters, and held the defendants to bail, to stand their trial as instigators before the Court of Circuit, and directed the Collector to take proper measures for the confiscation of the land which had been the occasion of the affray. He accordingly instituted this suit under the provisions of section 6, regulation 49, and the concluding part of section 7, regulation 1798, laying his suit at 1,000 rupees, at the rate of 10 rupees, *per beega*.

Mussummaunt Shunkuree Dossea appointed a *vakeel*, but took no further steps towards defending the suit.

Pran Kishen Dutt pleaded that the land in question belonged to Chuk Nurayun Khatta, situated in his talook of Bahir Milanea, Turuf Baneyra, Perganna Mandreh, and that he had obtained frequent decrees of Court, awarding to him the right thereto. With regard to the affray, which was the ground of the present action, he stated that the dependants of Mussummaunt Shunkuree Dossea had cut the rice which his ryots had cultivated on three

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1825.

Pran Kishen Dutt, v. The Collector of the Twenty-four Per-gunnas.

beegas of the land in question ; he not being present, and his people being perfectly passive : that the Circuit Judge, who tried the case, did not think his people guilty of affray, as, while he severely punished the opposite party, he sentenced his (defendant's) dependants to the trifling punishment of three months imprisonment only, because they were present. He further pleaded, that if a forfeiture had been incurred in consequence of the affray, justice demanded no more than the confiscation only of that portion (three beegas), which was the actual cause of the affray. He filed several decrees and documents to prove his right to the land in question, and to establish the fact that he actually had possession when the affray took place.

After maturely considering the proceedings held in the Civil Court, as well as those held by the Foujdaree Court and Court of Circuit, the Zillah Judge observed, that although it was clearly established by the evidence, that the land did really belong to Pran Kishen Dutt, yet that the ultimate decision of the case, as regarded forfeiture, was not affected thereby ; and as it was proved that an affray had taken place for the possession, he passed a judgment on the 9th of December 1819, declaring the said parcel of land containing about 100 beegas, duly forfeited to Government, under the provisions of section 6, regulation 49, 1793, and decreeing possession thereof to Government. The costs of suit were charged to the defendant.

Pran Kishen Dutt having appealed from this decision to the Provincial Court of Calcutta, that Court confirmed the decision on the 21st of January 1821, and dismissed the appeal with costs.

Pran Kishen being still dissatisfied, moved the Court of Sudder Dewanny Adawlut for the admission of a special appeal. As it appeared from the documents filed by the petitioner that he was the rightful owner of the land, and that the opposite party were the aggressors in the affray, the defendants of the petitioner being declared by the law officer of the Circuit Court liable only to *Tadeeb*, or admonition, for having opposed the adverse party while carrying off their grain, instead of applying for redress to the ruling power : and as the Zillah Judge had decreed the forfeiture in the vague terms of a parcel of land "containing about 100 beegas," the Court (present S. T. Goad and J. Shakespear, Third and Fourth Judges, in opposition to the opinion of the Second Judge, C. Smith) admitted a special appeal.

The respondent contended, that as it was proved that a serious affray had actually taken place regarding a disputed claim to the possession of the said land, the whole of the 100 beegas, which was the real cause of contention, was liable to forfeiture, and prayed that the decisions of the lower Courts might be confirmed.

After mature deliberation of the whole of the proceedings, the Court (present W. B. Martin, Fifth Judge) were of opinion, that it was clearly proved that an affray had taken place, in which the defendants of the appellant were concerned : and that the land, which was the cause of the said affray, was duly forfeited, under section 6, regulation 49, 1793 : and that it was highly expedient that the said provisions should be carried into effect for the purpose of removing the cause of contention. A final judg-

ment was therefore passed on the 6th of January 1825, confirming the decisions of the lower Courts, and dismissing the appeal with costs.

HUSSEIN ALI KHAN, NUSRUT ALI KHAN, and SHUJA'UT ALI KHAN, (Heirs of Shuhamut Ali Khan, deceased), Appellants, 1825.
Jan. 19th.
versus
MUSSUMMAUT I'HOOL BAS KOOR, (Widow of Baboo Jye Perkash Sahy), Respondent.

THIS suit was instituted in the Provincial Court of Patesa, by a case of Baboo Jye Perkash Sahy, the deceased husband of the respondent, against Shuhamut Ali Khan, the deceased father of the appellants, of mortgagor, under a deed of mortgage, under a deed of mortgage, under a deed of mortgage and conditional sale for the sum of 6,781 rupees, payable within one year from the date of the deed, rendered absolute by the failure of the defendant to pay off the mortgage within the period allowed by the regulations of Government. The amount of action was laid at 24,750 rupees, 18 years produce of the moiety in question.

The point at issue was whether the mortgagor had, under the circumstances of the case, forfeited his right of redemption, or not. The plaintiff stated, that as the defendant had allowed the period of one year, conditioned in the deed of mortgage, to elapse without payment, he petitioned the Zillah Judge to issue a *purwanna* to the defendant, under section 8, regulation 17, 1806, calling on him to pay the sum due within one year; that the Judge issued a *purwanna* receipt by on the 28th of June 1814; that the defendant, on the 30th of October 1815, deposited in Court a sum stated by him to be the whole sum due under the deed, and the Judge ordered it to be paid, received, and issued a *purwanna* to him (plaintiff) calling on him to receive the said sum. He pleaded, that as the sum due to him was neither paid him, nor deposited in Court, by the 28th of June 1815, the Zillah Judge was not authorized to receive it as a deposit, and that the defendant had forfeited his right of redemption. He therefore instituted this suit to obtain possession of the mortgaged property. The defendant stated, that although the notice was dated 28th of June, it was not served on him till the 9th of October 1814; and that it enjoined him to pay the sum of 6,781 rupees within the term of one year from the receipt thereof; and pleaded, that if it should appear that he had either tendered the said sum to the plaintiff, or deposited it in Court before the 9th of October 1815, his right of redemption was not forfeited. He stated that he had tendered to the plaintiff, in lieu of cash, a bond executed by Bhyroo Nath, a respectable *muhajun*, for the full amount due: but that the plaintiff told him he was in no hurry for his money, and would allow the debt to run on, if he, defendant, would execute a fresh deed of mortgage on the same property for the con-

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1825. solidated sum of principal and interest of the debt; that on his tendering a fresh bond, the plaintiff evaded the acceptance thereof, which induced him to think he was endeavouring to spin out the period of one year allowed by the notice, in order to foreclose the mortgage; that he, to save his estate, presented a petition through his *vakeels* to the Zillah Court, on the 30th of June 1815, (as would be proved by the endorsement of the *serishtadar* thereon) praying that the sum of 7,747 rupees, being the principal sum lent, with interest thereon, might be received, according to custom, as a deposit; that circumstances beyond his control delayed the reading of the petition till the 19th of September 1815, when the Zillah Judge ordered the immediate deposit of the whole sum: that his *vakeels* immediately paid into the treasury 6,000 rupees, and afterwards, in the course of the same day, the remaining portion (1,747 rupees): which sum of 7,747 rupees was remitted to the Collector's treasury on the 28th of the same month; that the Judge, on the 7th of October, having redrawn the said sum, ordered that it should be paid back to his *vakeels*, but subsequently, (on the 28th of October) he passed an order on a petition presented by the said *vakeels*, directing the redeposit of the said sum; that this was done on the 30th of the same month, when the usual order was issued to the lender, informing him of the circumstance, and desiring him to receive the money. He contended, that as, under the wording of the notice the term of one year did not close till the 9th of October 1815, the payment of the money in September barred the forfeiture of his right of redemption, although the Judge did once order the money to be returned to him.

Both parties filed documents in support of their respective pleas, and dying before the decision of the suit, were succeeded, the plaintiff by his widow, and the defendant by his sons.

The Third Judge of the Patna Provincial Court (J. Sanford) after perusing the whole of the pleadings and documents, was of opinion, that as the mortgagor had neither paid the money due under the deed of conditional sale, to the mortgagee, nor deposited it in Court within the period of one year from the date of the notice served on him under the provisions of section 8, regulation 17, 1806, his right of redemption was forfeited. He did not consider the tender of a bond a legal tender of payment, and held that the negotiation regarding the execution of a new deed of mortgage was entirely extraneous, and in no way affecting the ultimate decision of the case. He accordingly did not allow the defendants to prove that point: but passed a final judgment, on the 7th of March 1821, awarding to the widow possession of the moiety of mouza Godna, which had been sold under the deed of mortgage and conditional sale by Shuhamat Ali Khan. The costs were charged to the defendants.

The defendants appealed from this decision to the Court of Sudder Dewanny Adawlut: the pleas of the parties were similar to those urged by them in the Provincial Court.

The case came on, in the first instance, before the Second Judge (C. Smith), who, after considering the whole of the circumstances, was of opinion that the matter for the decision of the Court was, whether the borrower had actually paid the sum due

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within the period of one year as directed by the notice : he observed, that the notice, which was dated the 28th of June 1814, was not issued till the 19th of September, or served on the borrower until the 9th of October following, and that he was thereby directed to pay within the period of one year from the receipt thereof, the sum of 6,781 rupees, the principal sum lent, without mention of interest, under penalty of forfeiting his right of redemption : and it was proved by the documents, that he paid into Court, before the expiration of one year from the date on which the notice was served on him, not only the principal, but also what he considered to be the interest due up to the date when he first presented his petition to the Civil Court by his *vizkeels*, viz. the 30th of June 1815, so that, under the strict terms of the notice, he had done all and more than was required from him by the notice : and that even if it should be held incumbent on him to have paid interest, as well as principal, as directed by section 7, regulation 17, 1806, still as he had paid the interest due on the sum borrowed up to the date on which his petition was first presented, with the exception of about 30 rupees, it was not consonant with the spirit of the above regulation to deprive him of his property for so small a sum. He also observed, that if the date on which the term of one year was to commence, was held to be the date of the issue of the notice, it would appear that the full period of one year had not elapsed ; for it might be presumed, that the notice would not have been delivered to the *piyada*, who was to serve it, before nearly the close of the 19th of September 1814 ; and also that the money was paid into the treasury before the close of the 19th of September 1815 : and that until the opposite fact was proved beyond doubt by the lender, the presumption was in favour of the borrower. Hence he held the right of the borrower reserved, even under the section above quoted, as construed by the Court's circular order of the 9th of April 1817, which declares that all notices, if not issued the same day the order for the issue thereof is passed, shall bear the date of the day on which they are actually issued : this circular order, however, was not passed when those transactions occurred (in A. D. 1814 and 1815), the borrowers on *bye-bil-wufa* being then guided by the precedent laid down in a decision passed by Mr. James Stuart, former Third Judge of this Court, on the 24th of July 1813, in the case of Lukput Rai, petitioner, wherein it was laid down that the term of one year was to be reckoned from the day on which the notice was served on the borrower. He therefore recorded it as his opinion, on the 6th of December 1824, that the original plaintiff was not entitled to claim possession of the estate, and that the decision of the Provincial Court of Patna should be reversed ; and that had the abovementioned circumstances not been conclusive in favour of the appellants, they would have been entitled to prove the negotiation regarding the fresh deeds.

The Officiating Chief Judge (J. H. Harington) recorded it as his opinion, that as the borrower had been ordered by the notice to pay the principal sum within one year from the receipt of the notice, and as it was proved that he had done so, he had saved his right of redemption. He also thought the sum of 6,781 rupees, a very

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Hussein
Ali Khan
and others,
v. Musam-
māt Phool
Bas'Koor.

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1822. inadequate consideration for the sale of the estate in question, which was estimated to be worth 24,750 rupees.

Hussein Ali Khan and others, v. Muhammad Phool Bas Koot. In concurrence, therefore, with the opinion of the Second Judge, he passed a judgment, on the 12th of January 1825, reversing the decision of the Provincial Court of Patna, dated the 7th of March 1821, and dismissed the claim of the respondent to the moiety in question. As the respondent had obtained possession thereof in execution of the decision of the Provincial Court, it was ordered that possession should be immediately restored to the appellants; that the respondent should account to them for the mesne profits for the time she had possession: that she should receive the sum deposited in the Zillah Court; that the appellants should pay to her the balance due for interest up to the 18th of September 1815, and that the respondent should pay the costs of suit.

1825.

ABEH NUNDEE MUSTOFEET, Appellant,

versus

Jan. 15th. DOORGA DOSS and KASHI GUTTEE (Heir of JUGMOHUN SING, deceased), Respondent.

The respondent repaired an embankment whereby the land of the appellant was laid under water. On the suit of the latter, it appearing that the embankment was not in existence when the parties purchased their estates, the Sudder Dewanny Adawlut decreed that the embankment should be broken. This suit was instituted by Abeh Nundee Mustofee, in the Zillah Court of Beerbhoom, to compel Jugmohun Sing, zemindar of pergannah Aleenugur, to cut a *bund*, or embankment, which by confining the water, inundated 12 beegas, 9 cottas of land belonging to mouza Suthurea, his estate, thereby depriving him of the produce of the said land, and to recover the sum of 25 rupees, 6 annas, 15 gundas the produce of the said land for the year 1222, B. S. He pleaded that the former zemindar had allowed the *bund* to fall to decay about 50 or 55 years before, and that the defendant had no right to repair it to his prejudice. The defendant stated that he had built up the *bund* on the site of an old embankment: and contended that his right to build it, though dormant, was not extinct: and that as he had done so with a view to his own profit, and not to injure the plaintiff's property, his right to do so was unquestionable.

The Zillah Register being of opinion that the defendant had a right to restore the embankment, dismissed the claim of the plaintiff with costs.

The plaintiff appealed from this decision, but as the Register had been appointed Judge of the district, the appeal was removed to the Provincial Court of Moorshedabad, under the provisions of section 14, regulation 2, 1805. In addition to his former pleas, the appellant stated that the respondent had so far acknowledged his right to demand the demolition of the *bund*, as to offer him a portion of land equivalent to that which had been inundated: and that this offer had induced him to delay the institution of the suit: but on the respondent retracting his offer, he had instituted the present action. This was positively denied by the respondent.

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The Provincial Court of Moorshedabad seeing no reason to alter the decision of the Register of the Zillah Court, confirmed it; and dismissed the appeal with costs. 1825.

The Court of Sudder Dewanny Adawlut (present C. Smith, Second Judge, and S. T. Goad, Third Judge) admitted a special appeal, on the motion of the original plaintiff, for the purpose of taking further evidence as to the length of time during which the embankment had been allowed to lie neglected, and other points which appeared to call for further investigation. down, and awarded damages to the appellant.

The respondent died at this stage of the proceeding, and Doorga Das his brother, and Kashi Guttee his nephew, appeared to defend the suit as his heirs. His widow did not appear.

It appearing from the evidence taken by the Zillah Judge under the orders of the Court, that the estates of the parties in this suit had formerly composed parts of one and the same estate, which being divided into lots, had been sold by public auction by the Collector many years before, in satisfaction of arrears of public revenue; that when the parties purchased their estate, the embankment having fallen to decay, was not in existence: and that the land of the plaintiff, which was inundated by the reconstruction of the embankment, had been distinctly assessed by the Collector, when the *jumma* of the several lots was fixed, the Court (present C. Smith, Second Judge, and W. B. Martin, Fifth Judge) was of opinion that the respondent was not authorized to repair the *bund* to the prejudice of the appellant; a final judgment was accordingly passed on the 15th of January 1825, in favour of the appellant, reversing the decisions of the lower Courts; providing that the respondents should cut the embankment and pay to the appellant the sum of 25 rupees, 6 anas, and 15 gundas, being the produce of the inundated land for the year 1222, B. S. The costs of suit in the three Courts were charged to the respondents.

BABOO GIRWURDHAREE SING, Appellant,

1825.

versus

KULAHUL SING and others, Respondents;

Jan. 19th.

and

KEERUT SING, Appellant,

vers. s

BABOO GIRWURDHAREE SING, Respondent..

THE original suit, whence sprung these two appeals, was instituted in the Provincial Court of Patna on the 31st of December 1821, by Baboo Girwurdharee Sing, to recover from Keerut Sing possession of the landed estate of the late Raja among the Jeswunt Sing, consisting of certain Nizamut villages, situate in perganna Musodeh, and certain resumed jageer mehals, and other villages in perganna Arwul, zillah Behar. Suit laid at three years produce, 104,476 rupees, 11 anas, 1 gunda. Partition of an ancestral estate
heirs dead
creed in opposition to the claim of

1825. He pleaded that Raja Ram Chund, son of Chowdry Kunuk Sing, was the first acquirer of the estate ; that being childless, he adopted one heir to two sons, viz. Goolal Chund, his nephew, son of his brother Ajaib Sing, and Gundurp Sing, his great nephew, son of Doolar Sing and grandson of the said Ajaib Sing ; that on the demise of Raja Ram Chund while in attendance on the imperial court at Delhi, he was succeeded in his offices at court by Goolal Chund, and in his landed estates in Behar by Gundurp Sing ; that Gundurp Sing having no male issue, adopted his nephew Buhadoor Sing, who succeeded him in the estates in question ; that he was succeeded by his son Raja Jeswunt Sing, who died without issue, leaving his widow, who held the estate during her life ; that as the said widow had merely a life interest in the estate, it, on her death, would revert (the line of heirs from Raja Gundurp Sing having become extinct) to the heirs of Raja Goolal Chund, the other adopted son of the first acquirer, and that he, who was the eldest great-grandson by adoption of Raja Goolal Chund, (who having no male issue, adopted Boochun Sing, his nephew, the grandfather of the plaintiff) was the legal heir to the whole estate ; that on the death of the Ranee of Jeswunt Sing, Keerut Sing having unjustly laid claim thereto under a gift from the said Ranee, created disturbances, in consequence of which a summary order was passed leaving him in possession for the present, and referring the rest of the claimants to the Civil Court for the adjustment of their claims. He pleaded that the Ranee aforesaid, being a childless widow, had merely a life interest in the property, and could not alienate it ; and that under the custom of the family, he (the plaintiff) was entitled to take the whole estate undivided, as his lawful inheritance.

The defendant, Keerut Sing, denied the adoption by Raja Ram Chund of both Raja Gundurp Sing and Raja Goolal Chund, and claimed the estate on two distinct pleas, viz. by gift from the Ranee of Raja Jeswunt Sing and by inheritance, as being by birth a descendant from Doolar Sing, nephew of Raja Ram Chund, and by adoption a great-grandson of Raja Bhurut Sing. He stated that Bhurut Sing, who formerly had possession of the estate as Raja, having no male issue, adopted Luchmun Sing his (the defendant's) grandfather ; that as Luchmun Sing was very young when his adoptive father died, and the Ranee took the estate, she appointed Buhadoor Sing, Chuka Sing and Bhugwunt Sing successively managers of the estate on her behalf ; that on her death the mother of Bhugwunt Sing, son of Chuka Sing, became occupant of the estate, and appointed Jeswunt Sing manager thereof ; that on his death Jeswunt Sing became Raja and proprietor of the estate, which he, on his death, left to his widow ; that the said widow appointed him, the defendant, manager on her behalf, and executed a deed leaving him the estate after her death, as being her nearest heir.

The Provincial Court of Patna after perusing the whole of the pleadings and evidence, oral and documentary, prepared a genealogical table of the family of Raja Ram Chund, the original acquirer of the estate. They were of opinion that the defendant had not the slightest claim to the estate, either by inheritance, as he was in no way connected with the family of Raja Ram Chund, it

being clearly proved that Doolar Sing, the nephew of Raja Ram Chund, had no son named Chukoo Sing, from whom he stated himself to be descended; or under the deed executed in his favour by the Ranees of Raja Jeswunt Sing, which was invalid under the established principle of Hindoo law, whereby a childless widow taking the ancestral property of her husband has only a life interest therein, and cannot alienate it. With regard to the claim of the plaintiff to the whole estate, the Court observed, that it did not appear that Raja Ram Chund adopted two persons as stated by the plaintiff: for had he adopted Goolal Chund, and had the latter adopted Boodhun Sing, the estate would have devolved in succession on those two persons: or had he adopted Gundurp Sing, and the latter adopted Buhadoor Sing, Buhadoor Sing would have succeeded to the estate on the death of Gundurp Sing; whereas in fact, it appeared that the line of successors to the estate was as follows: on the death of Raja Ram Chund, Gundurp Sing, Bhurnt Sing, the wife of Bhurut Sing, and Chuka Sing, took the inheritance successively. After Chuka Sing, it was held conjointly by Buhadoor Sing and Bhugwunt Sing, after whom Raja Jeswunt Sing took it, and on his death left it to his widow, the last occupant. As therefore the estate did not appear to have invariably devolved entire, on the chief heir, but to have been taken by the most competent, and to have occasionally been held by several heirs conjointly, the Court considered it to be divisible among the heirs, according to the Hindoo law of inheritance, and accordingly submitted a statement of the case, and the genealogical table before alluded to, to their pundit, with instructions to say who were entitled to share in the estate, and in what proportions.

The pundit stated in reply, that if Raja Gundurp Sing adopted Raja Buhadoor Sing, the father of Raja Jeswunt Sing, the estate would devolve on the sons of the daughters of Raja Gundurp Sing. Otherwise it would go to the descendants from a common ancestor of Jeswunt Sing, viz. to the children of his brothers, in default of them to the brothers of Buhadoor Sing his father, and Chuka Sing his uncle; in default of them to the children of the brothers of Gundurp Sing, and in default of them also to the children of the brothers of Doolar Sing.

The Court having already declared the adoption of Buhadoor Sing by Raja Gundurp Sing unsubstantiated, were of opinion, that as the intermediate heirs had failed, the estate was divisible among the descendants of the brothers of Doolar Sing, and that as Goolal Chund and Omed Sing had left no issue, it should be taken by the descendants of Lal Sahy, and divided in the following manner: 8 anas to the sons and grandsons of Munsa Ram, son of Boodhun Sing, (or 2 anas each to Girwurdharee Sing and Neem-dharee Sing, the sons, and a like portion to each of the grandsons Durjpali Sing and Bheer Sing,) and 8 anas to the descendants of Duleep Sing (or 4 anas to Pyiwan Sing and Duryao Sing, grandsons of Kheer Sing, son of Duleep Sing, and 4 anas to Kulahul Sing and others, the grandsons and great grandsons of Mungul Dutt, son of Duleep Sing.

A decree was accordingly passed on the 19th of February 1823, rejecting the claim of the defendant, and directing that Girwur-

1823.
Baboo
Girwur-
dharee
Sing, &
Kulahul
Sing and
others; and
Keerut
Sing, &
Baboo
Girwur-
dharee
Sing.

1825: dharee Sing, the plaintiff, should be put in possession of 2 anas of the whole estate in his own right, and of 2 anas as guardian of his nephew Bheer Sing, who was a minor, and under his charge, to hold the same for his said nephew until he came of age. Of the costs, one-fourth was charged to the defendant, and three-fourths to the plaintiff.

Both parties appealed from this decision to the Court of Sudder Dewanny Adawlut: Girwurdharee Sing, the plaintiff, against Kula-hul Sing and the other persons who were declared entitled to the remaining 12 anas of the estate, laying his appeal at 3 years produce of the whole estate, instead of the 14 anas: and writing his petition on a stamp, value 2,000 rupees; but as three years produce of the 14 anas amounted to less than a lack of rupees, 1,000 rupees were returned to him. The defendant also appealed from the decision, against Baboo Girwurdharee Sing, laying his appeal at 13,077 rupees, 10 afas, 19 gundas, 2 covries, being three years produce of the 2 ana share awarded to Girwurdharee Sing, writing his petition on a stamp value 500 rupees; as however the decree awarded to the original plaintiff possession of 4 anas, three years produce of which amounted to 26,155 rupees, 5 anas, 19 gundas, he was ordered to pay the sum of 250 rupees into Court, to make up the proper stamp required for that sum. The pleas of the parties were similar to those brought forward in the Provincial Court.

On consideration of the whole of the pleadings and evidence, the Court (present C. Smith) held the decision of the Provincial Court to be perfectly just, and accordingly confirmed it, on the 19th of January 1825, and dismissed both the appeals with costs, payable by the appellants respectively.

1825. **RAM GHOLAM SING, Appellant,**
Jan. 19th. **KEERUT SING, GIRWURDHAREE SING, and KULAHUL
SING, Respondents.**

A claim to an ancestral estate dismissed under the Hindoo law of inheritance. RAM Gholam Sing, who was the grandson by a daughter of Raja Gundurp Sing (see genealogical table) instituted this suit *in formâ pauperis*, in the Provincial Court of Patna, on the 20th of July 1822, against Keerut Sing the occupant, and Girwurdharee Sing and Kulahul Sing, claimants of the estate of Raja Jeswunt Sing, to obtain possession of the whole estate, as his lawful inheritance. He pleaded that Raja Jeswunt Sing inherited the estate in succession to his father Raja Bahadur Sing, who had been adopted

succession to his father Raja Buhadoor Sing, who had been adopted by Raja Gundurp Sing, from whom he inherited the estate; and that as Raja Jeswunt Sing left no issue, the estate should be held to be the *Mutrooka* of Raja Gundurp Sing, his maternal grandfather, whose nearest heir he was.

The Provincial Court observed, that if the evidence had been sufficient to prove that Gundurp Sing had adopted Buhadoor Sing, the

plaintiff would, under the *vyavvustha* given in the preceding case, have been entitled to take the whole estate to the exclusion of all the claimants in the other cases; but that as that fact was not approved, he was excluded from the inheritance. A decision was accordingly passed, dismissing his claim with costs, to be levied in the usual manner.

The plaintiff appealed from this decision to the Court of Sudder Dewanny Adawlut; and although he pleaded in the Provincial Court as a pauper, presented his petition of appeal on paper of the prescribed value. He accounted for this by stating that he was enabled to do so by an agreement entered into by him with one Bishen Chund Sing, who agreed to advance the funds necessary for carrying on the appeal, in consideration of which he (the said Bishen Chund) was to receive one half of the estate if a decree should be passed in his (appellant's) favour, and prayed that in this event one half of the estate might be awarded to the said Bishen Chund, and one half to himself.

The Court (present C. Smith, Second Judge, and W. B Martin, Fifth Judge) after causing their records to be searched, could find no precedent to warrant such a proceeding, and observed that this transaction savoured strongly of gambling, and was moreover by no means a fair transaction, as if a decree were passed in favour of the appellant, Bishen Chund would obtain a moiety of an estate valued at from 2 to 3 lakhs of rupees, by risking somewhat more than 2,000 rupees, which he would have to pay as costs, were the appeal dismissed. They therefore ordered that the papers should be transmitted to the Provincial Court, with instructions to warn the appellant, that if this objectionable agreement which was unsupportable in a court of justice were cancelled, and the requisite conditions for the admission of a regular appeal performed within three months, this appeal would be admitted; otherwise it would be finally rejected.

The Provincial Court having certified that the objectionable agreement had been cancelled, and that the appellant had performed the necessary conditions, the Court admitted the appeal: but as the decision of the Provincial Court appeared perfectly just, it was confirmed on the 19th of January 1825, and the appeal dismissed with costs.

, 1825.

Jan. 25th.

**RAM KOOMAR NEEAEE BACHESPUTTEE, Appellant,
versus
SREE NATH BHUTTACHARUJ, BISHEN NATH BHUT-
TACHARUJ and others, Respondents.**

A summary decision passed by a Zillah Court in A. D. 1796, and confirmed by the Provincial Court in A. D. 1797, left to the party out of possession, the option of suing to establish his claim to certain lands: held that as no action had been instituted till A. D. 1815, the action was barred by the rule of limitation.

THE appellant instituted this suit in the Provincial Court of Calcutta, on the 30th of January 1815, to recover possession of 480 beegas of Birmooter land, (valued at 9,180 rupees, 18 years produce,) situate in pargunna Durodumna, Chukieh Hidgelee, Zillah Midnapoor, from the respondents. He pleaded that the land in question was the property of Ram Kaunt Serma his father: that the defendants having leagued with Kishen Kinkur Turk Boosun, his brother, instituted a summary suit in the Zillah Court of Midnapoor, and obtained a decree, awarding to them possession of the land, and leaving his (plaintiff's) father the option of instituting a regular suit to prove his right thereto: that his father, after having made a gift to him of his whole property, to the exclusion of the said Kishen Kinkur his elder brother, died; and that he had been unable to bring this action at an earlier period, as he had been engaged in a lawsuit with his brother, who had contested the validity of the gift, and that as he had obtained a final decision from the Court of Sudder Dewanny Adawlut upholding the gift, he instituted this action to recover possession of the land in question.

The defendants resisted the claim, and stated that the land formed a portion of their Birmooter land: and that Kishen Kinkur, the brother of the plaintiff, having dispossessed them from the land in question, they regained possession under a summary decree, which left to the father of the plaintiff the option of suing them to establish his right thereto. They pleaded that as the plaintiff had allowed so long a period as 17 years to elapse, during which they had held undisturbed possession of the land, without instituting his action, the cognizance of the suit was now barred by the rule of limitations.

The Provincial Court of Calcutta came to the following decision, after perusing the pleadings and documents filed by the parties. They observed that the evidence produced by the plaintiff was insufficient to establish his right to the land in question, and that as neither the father of the plaintiff, nor the plaintiff himself, had availed themselves of the permission granted by the summary decision of the Judge of Zillah Midnapoor, on the 1st of August 1796, confirmed by the Provincial Court of Calcutta on the 11th of September 1797, to institute a suit to prove their right to the land till the 30th of January 1815, the cognizance of the suit was now barred by the rule of limitations, contained in section 14, regulation 3, 1793, and regulation 2, 1805, for the Court did not hold the plea of the disputes between the plaintiff and his brother sufficient to reserve to him his right of action. A judgment was accordingly passed in favour of the defendants on the 6th of April 1821, dismissing the claim of the plaintiff with costs.

The plaintiff appealed from this decision, but the Court of Sudder Dewanny Adawlut (present C. Smith) seeing no reason for altering it, passed a final decision confirming it, and dismissed the appeal with costs.

While the appeal was still pending, a petition was presented to the Court by Kishen Kinkur, the brother of the appellant, claiming to share equally with him in the property of Ram Kaunt their father, and praying to be allowed to carry on the appeal jointly with him. As the decision of the Provincial Court was confirmed, the Court did not pass any particular order on his petition.

BABOO RAM DOSS (Heir of Baboo Mukund Lal, deceased) 1825.
Appellant,
versus

RAJA RUN BUHADOOR SAHEE, BABOO KULAHUL SING Jan. 27th.
(Son of Dunea Sing, deceased), and **BABOO JYE LAL**
SING (Son of Perraub Sing, deceased), Respondents.

DUNEA SING and Perraub Sing instituted a suit in the Provincial Court of Benares, on the 19th of February 1819, to recover from Raja Run Buhadoor Sahee the sum of 65,581 rupees, stating that the Raja executed a bond in the year 1213, F. S., in their favour, for money lent, &c. to the amount of 24,000 rypees, and mortgaged to them his *jageer*; and provided that they should hold possession thereof till the sum due to them should be liquidated from the proceeds of the *jageer*: that as the Raja had not given them possession in 1220, F. S., they threatened to sue him to recover their money; on which he entered into a fresh bond, mortgaging the *jageer* for 65,581 rupees, which, on a settlement of accounts, appeared to be the sum due to them, and put them in possession. But that as they had discovered that he was about to mortgage the *jageer* to another person, they instituted this suit to recover what was due to them under the bond.

Raja Run Buhadoor Sahee acknowledged the execution of the bond for 65,581 rupees; but pleaded that that sum was not now due under the bond, as the plaintiffs must have repaid themselves part of the debt from the proceeds of the estate. He stated that the said *jageer* was his only *jaidad*, and that the plaintiffs had engaged to pay off his other debts, and to make him an allowance from the proceeds of the *jageer* for his support, but that as they had neglected to fulfil their engagements, and the *jageer* was about to be sold in satisfaction of a decree obtained against him by Baboo Mukund Lal, he, to preserve the *jageer*, had negotiated a mortgage thereof with Raja Oodwunt Sing, which coming to the plaintiffs ears had caused them to institute this suit.

The plaintiffs in reply stated that they only wished to recover what, on an adjustment of accounts, might appear due to them.

A petition was presented to the Court while the case was still pending by Baboo Mukund Lal, who stated, that he having sued Raja Run Buhadoor in the Zillah Court of Mirzapoore, to recover a sum of money due to him by the Raja, he obtained a decree in his favour on the 11th of February 1809: that the Raja wishing to

1825. appeal therefrom, instead of furnishing security, executed an *ikrarnama* on 5th of December 1809, engaging not to sell, mortgage, or otherwise alienate his *jageer*, till the sum decreed against him were paid : that the said decree having been confirmed by the Sudder Dewanny Adawlut on the 20th of June 1817, a large sum

then receive the balance of their claim. The third party appealing to the Sudder Dewanny Adawlut, it was ordered that he should receive the whole of the sum due under the decree, before the plaintiffs were paid any part of their debt.

The case was submitted to arbitrators, who gave in an award, whereby it appeared that the sum of 56,586 rupees, 12 anas, 3 gundas, 2 cowries, was due by Raja Run Buhadoor to the plaintiffs, up to the end of *Bhadoon* 1225, F. S. The Court observed, that the first mortgage bond executed by the Raja in favour of the plaintiffs was dated 1st *Jeyt*, 1214, B. S. (22nd of May 1807) and that the second mortgage bond was dated 5th *Sawun Budee*, 1220, B. S. (18th of June 1813,) and considered it just that the payment of the money due to the plaintiffs, under the first mortgage bond, should precede the payment of the money due to Baboo Mukund Lal, under the *ikrarnama* executed on the 5th of December 1800, by Raja Run Buhadoor, in lieu of security ; and that after the sum due on that *ikrarnama* was paid, the sum due under the second bond should be liquidated. The Court therefore ordered that the plaintiffs should first receive from the *jageer* of the Raja the sum of 24,170 rupees, being the sum due under the first bond executed in their favour ; that Baboo Mukund Lal should receive the whole of the money due to him under the *ikrarnama* ; after which the plaintiff should receive the balance of 56,586 rupees, 12 anas, 3 gundas, 2 cowries.

Baboo Mukund Lal demised, after having preferred an appeal from this decision against Raja Run Buhadoor and the other respondents, the heirs of the original plaintiffs, who also had died ; and was succeeded by the present appellant, his son and heir. The appellant stated, that the original plaintiffs were servants of the Raja, and that the two mortgages executed by him were not *bond fide* transactions ; and that this suit had been instituted by them, with the consent of the Raja, with a view to defraud him of the sum due to him under a decree of the Sudder Dewanny Adawlut ; which he pleaded should have the preference to any other claim. He therefore prayed that the Raja might be compelled to pay him the full amount due to him under the above decree, before the sums declared to be due to the heirs of the original plaintiffs were paid.

The respondents having failed to appear to defend the case, the appeal was decided *ex parte*. The Court (present C. Smith and W. B. Martin) on consideration of all the circumstances of the case, were of opinion that the Provincial Court of Benares were not authorized, four years after the passing of a decision of the Sudder Dewanny Adawlut, to give to any document filed by the plaintiffs a preference to such decree, and that the appellant was entitled to receive every rupee which was due to him under that decree,

before the heirs of the original plaintiffs received any part of their debt. They therefore amended the decision of the Provincial Court, and ordered that the appellant should first receive the sum due under the former decision, passed in favour of his father, from the proceeds of the Raja's *jageer*, and that the heirs of the original plaintiffs should then receive the sum decreed to them by the Provincial Court.

1825.

Baboo Ram
Doss, v.
Raja Run
Buhsadur
Sabi and
others.

BABOO RAM GHOSE, Appellant,
versus

KALEE PERSHAD GHOSE (for himself and his minor son BISHUMBER GHOSE), and DEB NATH GHOSE, Respondents.

1825.

Feb. 9th.

BABOO Ram Ghose instituted this action on the 25th of November 1818, in the Provincial Court of Calcutta, to recover from the respondents the sum of 10,241 rupees, 8 anas, 11 gundas, being the principal and interest due on a *kistbundee*, or bond payable by instalments. He stated, in his petition of plaint, that the sum of 5,825 rupees, was due to him under two bonds executed by Gouree Churn Ghose, the father of Kalee Pershad Ghose, and Deb Nath Ghose, and Ram Ruttun Ghose, deceased, in the years 1207 and 1208, B. S.; that the principal and interest of that debt in the year 1219, B. S. having amounted to 11,650 rupees, Kalee Pershad Ghose, Ram Ruttun Ghose, and Deb Nath Ghose, paid to him in cash the sum of 525 rupees, but being unable to pay the balance at one instalment, they, on the 3rd of *Bhadoon* 1219, B. S., entered in to a *kistbundee* or bond, promising to pay the in favour balance 11,125 rupees, with interest at the rate of 12 per cent of the *per annum*, at several instalments, by the month of *Chyt* 1222, while he B. S.; that they had paid him a portion of the debt, but refused to pay the balance, which, with interest up to the month of *Kartick* 1225, B. S., amounted to the sum claimed. He therefore instituted this action to recover the said sum from Kalee Pershad Ghose and Deb Nath Ghose, who signed the bond on their own behalf, and from Bishumber Ghose (the minor son of Kalee and Pershad Ghose through his father and guardian), and the aforesaid Deb Nath Ghose, the donees and occupants of the property of Ram Ruttun Ghose, who demised in 1223, B. S., after having made over to them the whole of his property by a deed of gift.

Kalee Pershad Ghose for himself and his son, and Deb Nath Ghose for himself, denied that they and Ram Ruttun Ghose had either executed the bond pleaded by the plaintiff in 1219 B. S.: or that they had ever paid him any sums on such a bond: declaring that their father Gouree Churn Ghose being affected with the palsy, and deprived of his senses in 1207 B. S., died in that year, when the plaintiff was appointed their guardian, and had the sole control of their affairs, and had never given any

1825.

Baboo Ram Ghose, v. Kalee Pershad Ghose and others. account of his guardianship up to the date of their answer, and that he, hearing that they had it in contemplation to institute a suit against him to compel him to render an account of their property, had instituted the present action to forestall their claim; they also pleaded, that though Kalee Pershad Ghose had come of age in 1219, B. S., the plaintiff had still the management of the concerns of the family, and he was totally unacquainted with the state of his affairs: and that therefore if the plaintiff had taken advantage of their ignorance to make him and his two brothers, who were still minors, sign any bond, it could not be held valid in a court of justice.

The plaintiff in his rejoinder declared that Gouree Churn Ghose executed the first bond before his death, in 1207 B. S., and that his widow Mussummaut Shunkuree Dossee, the mother of the defendants, and Ram Ruttun Ghose deceased, borrowed the money on the second bond in 1208 B. S., and signed it in her own name, on behalf of her sons, and that he, having been removed from the guardianship in 1216 B. S., the defendants had the sole control of their affairs from 1217 B. S.

The defendants in reply denied that the plaintiff had been removed from the guardianship in 1216 B. S., and challenged him to produce any *farikhuttee* or other document to prove that he had settled the accounts of his guardianship. They pleaded that the original bond of 1208 B. S., could not be considered as binding on them, even if executed, as their mother had no authority to execute any deed on their behalf while they were under the guardianship of the plaintiff.

The Senior Judge of the Provincial Court of Calcutta, on perusal of the pleadings and documents filed by the parties in proof of their respective claims, came to the following decision: He observed, that it appeared from the evidence that Gouree Churn Ghose executed a *mokhtarnama* on the 14th of *Aghun* 1206 B. S. (27th of November A. D. 1799), whereby he appointed the plaintiff the *mokhtar* or manager of all his affairs, and that after the death of Gouree Churn Ghose aforesaid, the plaintiff was, on the strength of the *mokhtarnama* aforesaid, appointed guardian of the children of the deceased, under a *sunnud* issued to him by the Judge, dated 8th of August, A. D. 1801 (25th *Sawun* 1208, B. S.), and that though the minority of Kalee Pershad, one of the defendants, expired in 1219 B. S., it did not appear that the plaintiff had ever rendered any account of his trust, or that he had been exonerated from the charge. The plaintiff was unable to produce any accounts to prove that any transactions regarding money had ever taken place between him and the father of the defendants. As therefore the plaintiff had the management of the concerns of the family of the defendants from 1206 B. S., to the alleged time of executing the bond, which formed the ground of the present action, the Senior Judge considered the bond said to have been executed in 1207 B. S., invalid, from the fact of the plaintiff having the sole control of the affairs of Gouree Churn, the alleged writer thereof. The bond of 1208, B. S., he also declared could not be held as binding on the defendants, as their mother had no authority to execute it on their behalf. These

bonds therefore being held to be invalid, and the plaintiff being unable to produce accounts to shew that the debt specified in them had ever been incurred by the defendants or their father, formed sufficient grounds, he thought, for exempting the defendants from responsibility under the bond said to have been executed by them in 1219, B. S., independently of the strong presumption which existed that the plaintiff had taken advantage of his capacity of guardian to induce the defendant Kalee Pershad Ghose and Deb Nath Ghose, and their deceased brother Ram Ruttun' Ghose, to put their names to the *kistbundee*. He therefore passed a decision on the 11th of November 1821, dismissing the claim of the plaintiff with costs.

An appeal being preferred from this decision, by the plaintiff, to the Sudder Dewanny Adawlut, the Court (present C. Smith) on consideration of the facts of the case, concurred in the reasons which guided the Senior Judge of the Provincial Court in dismissing the claim, and accordingly confirmed his decision, and dismissed the appeal with costs.

**MUSSUMMAUT HIMULTA CHOWDRAYN, Appellant,
versus
MUSSUMMAUT PUDOO MUNEE CHOWDRAYN,
Respondent.**

1825.

Feb. 14th.

The following genealogical table shews the family of the parties:
CHOWDRY RUGHOO RAM RAI:

Ram Chunder Rai and his wife Mussummaut Keolla both dead.	Ram Kishob Rai died 1203, B. S. leaving his widow (Mussummaut Shunkeree, who died in Chyt 1209,) and issue.	Mussummaut Nurainee Dossea.		
Ram Ram Ram	Ram Ram Ram	Bijeh Gour		
Rooder Lochun Soonder	Koomar Jewun Kuraul	Kishen Kishore		
Rai died Rai died Rai died	Rai died Rai died Rai died	Mujmoodoosha		
without without in Byasakh	without without in Bhadoon	Mujdar		
issue in issue in 1218,	issue in issue in 1203,	and died		
Chyt Asar leaving	1204.	moodar alive.		
1201, 1199, a son,	still			
leaving leaving	alive,			
a widow a widow Kishen	and had			
Kishen- Mus-	Kishen	Asar		
munee, summaut Soondar	Kishob			
who died Chow- Rai alias munee,	Rai her			
in 1225, drolee.	husband,			
B. S.				
Assor	Kishob Nath	Kishen Nath	Gooroo Churn	Mussum-
1293,	Rai died	Rai died	Rai died	maut Ki-
leaving	Jayt	By-	Rai died	died Poos
his wi-	1218.	sukh	Magh 1224.	1225.
dow Himulta				
Chowdrayn, defendant,				
and a daughter,				
Mussummaut Birj Soon-				
deri, died in 1227.				

1825.

THIS suit was instituted by Mussummaut Pudoo Munee Chowdrayn, in the Provincial Court of Moorschedabad, on the 26th of March 1819, to obtain possession of an eight ana share of the Chowdrai Kismut of Taraspoor, and Turuf Rajapoer, Koee Jooree, Kyebankulpar, &c. an hereditary estate, and of Turuf Kultehpara and other mouzas, purchased with the profits of the hereditary estate, from Mussummaut Himulta Chowdrayn. * The amount of action was laid at 79,597 rupees, 9 anas, 8 gundas, 2½ cowries, being three years *jumma* thereof.

Claim by respondent for a moiety of an ancestral estate as heir to her deceased husband and his brothers : dismissed, as it appeared that her husband died before his father and brothers. She was declared entitled to maintenance only.

The plaintiff stated that on the death of Chowdry Rughoo Ram Rai, the hereditary estate was held conjointly by his sons, Ram Chunder Rai and Rajn Kishob Rai; that after the death of the former, his three sons continued to mess with Ram Kishob and his sons, as an undivided family: that Ram Koomar Rai, her husband, having given her an *anumuti putr*, or permission to adopt a son, died in Bhadoon 1201, B. S. after which she (the plaintiff) lived in her father-in-law's house: that after his death, and the death of his two other sons, and of Ram Roorder Rai and Ram Lochun Rai, his nephews, the plaintiff lived in the house of Ram Soonder Rai: that on her consulting with him about adopting a son, and demanding her share of the estate, in right of her husband and his brothers, he evaded the demand, but at last executed a deed for her satisfaction, acknowledging her right to adopt a son, and her claim to share in the estate; that on his death Birj Soonder, his son, also acknowledged her right, but some delay occurred in the adoption of a son, when Birj Soonder dying, his widow, Himulta Chowdrayn, claimed the whole estate. She therefore brought this action to obtain possession of a moiety of the ancestral and acquired estates in right of succession to her deceased husband and his brothers.

The defendant resisted the claim of the plaintiff to share in the estate in question, alleging that she was only entitled to maintenance therefrom. She stated that Ram Kishob Rai separated from his brother in 1201, B. S., and being disconsolate at the death of Ram Koomar Rai, his eldest son (the husband of the plaintiff), formed an intention of undertaking a pilgrimage, and having resigned the whole of his property real and personal to his two surviving sons, died shortly after in 1202, B. S.; that Ram Jewun died unmarried in 1203, B. S., after having given up his share of the estate to his brother Ram Kumul, who subsequently made over the whole of his interest in the hereditary estate to his cousin Ram Soonder, father-in-law of the defendant, on the condition of his supporting the plaintiff and his other female relations, and died in 1204, B. S.; that from that time to the present, Ram Soonder, Birj Soonder his son, and the defendant herself, had successively taken the estate, and supplied the plaintiff with food and raiment. She pleaded that as Ram Koomar Rai died during the lifetime of his father, the plaintiff, his childless widow, (for though she pleaded permission to adopt she had not done so), was not entitled to claim possession of any share in the estate of her father-in-law: and that as she had allowed so long a period as 22 years to elapse without having adopted any son, there were strong grounds for presuming that the *anumuti putr* pleaded by her was a forgery.

The Provincial Court of Moorshedabad having consulted their ^{1825.} pundit, received a *vyuvustha* in the following terms: "if a person during his father's life, have given his wife permission to adopt a son, and die, and if in the deed granting that permission it be written, "on my death let my son take my share," such deed is not valid, under the *Shaster*, for the son is not heir to his father's wealth during his father's life. A son dying during his father's life is not heir to his wealth. If a person have two sons, to one of whom three sons are born, and of these three one die during the lifetime of his father and brothers, having given his wife authority to adopt a son, and if after this, the other two brothers die without issue, the widow of the deceased is not heir to their property; it will go to the heir of the other brothers." The plaintiff filed some *vyuvusthas*, whence it appeared that a person is not prohibited from granting to his wife permission to adopt a son during the lifetime of his father and brothers; and that a son so adopted by the widow, would take the property of the father and of the childless brothers of the person who granted permission to adopt, even although they should survive him (the granter of the permission). The Court were of opinion, that these *vyuvusthas* were supported by Mr. Colebrooke's translation of the Digest of Hindoo Law, and that the *vyuvustha* of their law officer was not correct. They were also of opinion, that it was satisfactorily proved that the husband of the plaintiff did grant her permission to adopt; that the property had never been divided; and that the defendant had failed to prove the facts of the gift of the property claimed by Ram Kumul Rai to her father-in-law. A decree was accordingly passed in favour of the plaintiff on the 6th of July 1821, awarding to her possession of the share of the estate claimed by her. The costs were charged to the defendant.

The defendant being dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. Petitions were also presented against the decision by Mussummaut Ram Munee, and Gour Kishore Mujmoodar. Mussummaut Ram Munee, the daughter of Ram Kishob Rai, claimed the estate awarded to the plaintiff, pleading that she was the rightful heir to the estate of her father and her brothers, and that as the husband of the plaintiff had died during the lifetime of his father and brothers, his widow could not claim to be heir to them. Gour Kishore called himself the son of Nurainee Dossea, daughter of Chowdry Rughoo Ram Rai, and claimed the whole estate, as all the male heirs were extinct; and stated that both the appellant and respondent were entitled merely to food and raiment. The appellant denied all knowledge of Nurainee Dossea, and the respondent said that Rughoo Ram had no such daughter, and that the person claiming to be grandson of Rughoo Ram by a daughter was an impostor.

The case came on before the Second Judge (C. Smith), on the 4th of January 1825. He was of opinion that the *anumuti putr*, dated 14th *Bhadoon* 1201, filed by the respondent, and the deed said to have been executed in her favour by Ram Soonder Rai, confirming it, were unworthy of credit; for it appeared that no mention had been made of such a deed for twenty-two years after her husband's death, which time she had allowed to elapse without

1825. — adopting a son : and that it now remained to determine whether, under the Hindoo law, she was entitled to take the inheritance of her husband and his brothers. The following question was accordingly put to the pundits of the Sudder Dewanny Adawlut : “ Ram Koomar Rai, son of Ram Kishob Rai, having died during the lifetime of his father, will Mussummaut Pudoo Munee, his widow, take any share in his property, or in that of Ram Jewun Rai and Rafn Kumul Rai, his full brothers, who died after their father? and if so, what proportion thereof ? ”

The answer of the pundits was as follows : “ If Rughoo Ram Rai dying left two sons, Ram Chunder Rai and Ram Kishob Rai, and the latter had three sons, Ram Koomar Rai, Ram Jewun Rai, and Ram Kumul Rai, of whom Ram Koomar Rai died without issue, leaving a widow, Mussummaut Pudoo Munee, and if after this Ram Kishob Rai died leaving heirs, his two remaining sons; the right of Ram Koomar Rai to the property left by Ram Kishob Rai is barred by his having died during his father’s life. His widow therefore is not entitled to any share in the property of her deceased husband’s father : she is entitled to receive maintenance therefrom, and to take by inheritance, during her life, any property of which her husband had possession during his life.

“ If either Ram Jewun or Ram Kumul died during the life of Mussummaut Shunkuree Dossea, their mother, she would take the share of the deceased : if they both died before her, she would take the property of both. If the mother died first, and then the two brothers, the sons of Mussummaut Ram Munee, daughter of Ram Kishob Rai, if they had survived them, would have taken the property of the two brothers : and after their death Ram Munee would have succeeded thereto as their heirs.

“ If Shunkuree Dossea and the sons of Ram Munee died during the lifetime of Ram Jewun and Ram Kumul, Ram Munee, their sister, cannot take the property. But on the death of these two persons the lineal descendant in the male line of Ram Kishob Rai, who is alive, and next of kin to those persons, will be entitled to take the said property, which, after his death, will devolve on his heirs.”

“ This *vyuvustha* is according to the *Dayabhaga*, *Dayatutwa*, and other tracts current in Bengal.

Authorities, 1st, *Menu* in the *Dayabhaga* and other tracts : “ Brothers, on the death of their father and mother, having divided the ancestral property, will take equal shares. During the lifetime of their father and mother, they have no power over that property.” See *Colebrooke’s Translation*, vol. 2, page 423, 8vo. edition.

2nd, *Devala* in the *Dayabhaga* and other tracts : “ Sons after their father’s death will divide the paternal property : if a faultless father be alive, the sons have no power over his property.” See *Ibid.* vol. 1, page 522.

3rd, *Yajnyawalcy* in the *Dayabhaga* and other tracts : “[On the failure of son or son’s son] the wife, and the daughter, also both parents, brothers likewise, and their sons, gentiles (*gotruj*), cognates (*bundhoo*), &c. take the estate in succession.” See *Ibid.* vol. 3, page 489, also the *Mitacshara*.

4th, *Dayabhaga*: "On failure of sons and their male issue, the sons of daughters of the father shall obtain the property" (See Colebrooke's Translation, vol. 3, page 498.)

On consideration of this *vyuvustha*, and the circumstances of the case, the Second Judge on the 10th of January 1825, recorded it as his opinion, that the respondent was not entitled to any share in the ancestral property of Rughoo Ram Rai, and that the decision of the Provincial Court of Moorshedabad ought to be reversed, and that the respondent might be left at liberty to sue the estate for her maintenance, and ordered that the papers of the case should be laid before another Judge.

The case was next taken up by the Fifth Judge (W. B. Martin). He observed, that it appeared from the proceedings that no mention had been made of the *anumuti putr*, or deed said to have been executed by the husband of the respondent, granting her permission to adopt, for nearly 22 years after his death, in 1201 B. S. and that the said document was not produced before the Collector, when he, in his *roobukaree* of the 10th of August 1816, (27th *Sawun* 1223, B. S.) directed her to file proofs of her claim to the estate. He therefore thought the evidence produced insufficient to authorize the carrying into effect the conditions thereof. And as the *vyuvustha* declared that her claim to share in the estate was barred, and that she was only entitled to maintenance, he concurred with the Second Judge, and passed a judgment on the 14th of February 1825, annulling the decision of the Provincial Court of Moorshedabad, and dismissing her claim. The costs of both Courts were charged to her; and the option of suing the holders of the estate for maintenance was left to her.

As Mussummaut Ram Munee and Gour Kishori Mujmoodar did not bring forward their claims in the Provincial Court, no notice was taken of them, and they were referred to a regular suit for the adjustment of their respective claims.

1825.
Feb. 19th.

**ALI BUKSH KHAN and ALI MOOHUMMUD KHAN,
(Heirs of DURYA KHAN deceased), Appellants,**
versus
**KUSTOREE SING, SHEO DEEN SING and TEJ SING,
Respondents.**

Claim to hold an estate as zemindar in opposition to the person with whom the settlement had been made by Government : claim adjudged, but permission given to the opposite party to sue for the recovery of the estate under an alleged deed of gift.

THIS action was instituted in the Zillah Court of Cawnpoor, on the 4th of March 1814, by Man Sing, Munee Sing, and Debee Sing, the sons of Dhun Sing deceased, against Duria Khan the zemindar of mouza Bhusolee, to obtain possession of mouza Chursureh, pergunna Sarah, zillah Cawnpoor, the annual produce of which was estimated at 901 rupees, and Government assessment thereon stated at 825 rupees.

The plaintiffs stated that the village was the hereditary zemindaree of their family, and that their father, Dhun Sing, had possession thereof till 1204, F. S. when the *aumil* on the part of the Nuwab Vuzeer, having demanded from him a higher rent than he could afford to pay, he fled from the village with his family, to a relation's house in pergunna Futtehpoor, where he died : that they (plaintiffs) being minors, Buhadoor Ali, the *aumil* of the pergunna, concluded a settlement with Uchul Sing, in 1206, F. S. and granted him a pottah as zemindar, under which he retained the village till his death ; when the rents thereof were collected *khas* till the cession of the province to the British Government ; that after the cession, when the settlement of 1210, F. S. was making, they being unacquainted with the mode in which business was conducted, did not appear in person before the Collector, but tendered their proposals through Dowkul Sing, their *mokhtar* : that the Collector did not agree to the terms on which they wished to engage for the village, and concluded the first settlement for the years 1210, 1211 and 1212, F. S. with Soomen Shah, as *moostajir* ; that at the second settlement for the years 1213, 1214 and 1215, F. S. Dowkul Sing again appeared before the Collector, in order to engage for the village, and had his name entered in the column of proprietors, but did not engage in consequence of the heaviness of the *jumma* ; on which the settlement was concluded with Sheo Buksh as *moostajir*, that during this time Dowkul Sing, as their *mokhtar*, received the zemindaree dues (a) on their behalf ; that at the third settlement for the years 1216, 1217, 1218, and 1219, F. S. the settlement was for similar reasons concluded with Chutter Goutum, as *moostajir* ; that after the conclusion of this settlement, they, on hearing that Durya Khan, the zemindar of mouza Bhusolee claimed a right to hold the village of Chursureh as zemindar, made an application to the Collector, who informed them that at the expiration of the existing settlement, the next settlement would be made with whoever should then appear to be the zemindar : that they remained in the village holding possession and enjoying the profits of the topes, tanks, wells, &c. waiting for the next settlement : but when the time for concluding it arrived, they were unavoidably absent ; and Durya Khan taking advantage of their absence, got the village under a

(a) *Malikhank nankar*, and other dues receivable by zemindars.

zemindaree pottah for five years (1220 to 1224, B. S., both inclusive) that they, on their return, hearing of this, applied to the Collector for redress, but not obtaining it, they instituted the present suit. They also stated, that about four years before the institution of this suit, Heera Lal, *Canoongo* of the pergunnah, Kustoree having obtained possession of their title deeds on the plea of examining them, had destroyed them; and that they having complained against him in the *Foujdaree* Court, were referred to a civil action for redress: but that they could, notwithstanding, prove their hereditary right to hold the village as zemindars, and that the defendant never had any concern therein till he fraudulently got possession at the settlement of 1220 F. S.

Subsequently to the institution of the suit, the plaintiffs presented a petition to the Zillah Court, stating that the defendant, in order to evade their claim, had sold the village pending the institution of the suit, to one Mudar Lal, a connection of Gunga Pershad and Thakgor Surroop Sing, former *canoongoes*, and had applied to the Collector to have the estate entered in the records under the name of the said purchaser; and prayed that a precept might be issued to the Collector, enjoining him to stay the *dakhil mokharij*. The Court did not think it necessary to stay the *dakhil mokharij*, as the sale had taken place subsequently to the institution of the suit; but issued a notice to the purchaser, warning him that the purchase would not prejudice the right of the plaintiffs, if a decree should, on investigation, be passed in their favour.

Durya Khan denied the right of the plaintiffs to the estate as zemindars. He stated that Zyn Khan, his ancestor, above a century ago, divided a portion of jungle land from his zemindaree of Bhusoolee, and having brought it into cultivation, formed a village or mouza, which he named Chursureh: that after him, Yacoob Khan and Tutur Khan, Subdul Khan, and Moohummud Kaim his ancestor; and after them Ghazee Khan his uncle, and Abdoola Khan his father, had undisturbed possession thereof, which they transmitted to him; that he did not engage for the rent in 1210, F. S. as the *jumma* was raised from 750 rupees to 871 rupees; and that the first, second, and third settlements were made with Soomer Shah, Sheo Buksh and Chutter Goutum, as *moostajirs*, but that he, on proof of his right to hold the village as zemindar, was allowed to engage at the quinquennial settlement of 1220, F. S. and pleaded that the fact of the plaintiffs having tanks, wells, &c. in the village, did not constitute them zemindars.

Several documents were filed by both parties in proof of their respective claims, and several witnesses were examined.

On consideration of the pleadings, and the whole of the evidence before him, the Officiating Zillah Judge deemed it clearly established by the evidence of the witnesses of the plaintiffs, that Uchul Sing and Dhun Sing, the uncle and father of the plaintiffs, had possession of the village in former times; and that though the witnesses of the defendant stated that his ancestors had held possession of the village, their evidence was not worthy of credit, as they could not depose that either the ancestors of the defendant, or he himself, had received the zemindaree dues during the twenty years which the estate was held in *khas*.

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tehsil previous to the cession. He was of opinion, that the defendant had no right to the zemindaree of the said village, inasmuch as at the first settlement of the pergunna in 1210, F. S. his name was not entered in the column of proprietors (the column of proprietors being left vacant) in the *roobukaree bundobust* of the village of Chursureh for that settlement; as had he then had any claim to the village as zemindar, he would have made every endeavour to 'have his name entered as such in the records of the Collector's office, which it did not appear that he had done, though he was in attendance at the Collector's *cutcherry*, and entered into engagements for the village of Bhusoolee, his *bond fide* zemindaree. With regard to the defendant's objection that the possession of tanks, wells, &c. did not constitute a person zemindar, the Officiating Judge observed, that as it appeared there was neither tank, well, nor any building in the village, built, or prepared either by him or his ancestors, this fact formed a strong ground for presuming that his claim to the village was unfounded.

With regard to the transfer to Mudari Lal, which was proved by certain *dakhilas*, or receipts for public rent, paid by Mudari Lal, the Officiating Judge observed, that though the plaintiffs had adduced no proof of the connection between him (the said Mudari Lal) and Gunga Pershad, it was evident that the connection did exist; as Mudari Lal, though the notice above alluded to was served on him, had not appeared to deny the fact, nor did the defendant himself deny it: and that this Gunga Pershad was a person who had been publicly prohibited by the Board of Commissioners, on account of his malpractices, from interfering in any manner with matters relating to the Collector's *cutcherry*. He did not consider the documents produced by the defendant as at all sufficient to prove his right to hold the village as his zemindaree: being of opinion that he, at the first settlement of 1210, F. S. had no intention of claiming it; but by the advice and counsel of the aforesaid Gunga Pershad and other evil disposed persons, had subsequently entered the name of the village of Chursureh in the deeds he held relating to mouza Bhusoolee.

On the following considerations therefore, 1st, the failure of proof that either the defendant or his ancestors ever received the zemindaree dues during the period of the *khaz tehsel*; 2nd, the want of proof that he, though present at the Collector's *cutcherry* at the time of the settlement of 1210 F. S., made any endeavour to establish his claim to the village; and lastly, the impression that Durya Khan was not the real defender of the suit, that he was a puppet moved by some person who did not appear, the Officiating Judge passed a judgment on the 4th of February 1819, awarding possession of the village to the plaintiffs. The costs were charged to the defendant.

The defendant appealed from this decision to the Court of Appeal for the division of Bareilly. He argued that the respondents had failed to prove their right to hold the village as their zemindaree, and pleaded that under these circumstances it had not become necessary for him to prove his right thereto, which, however, he contended, that he had done. He also pleaded, that as the plaintiffs had not had possession of the village within 12 years, their right of action was barred.

The respondents in reply pleaded that they had saved their right of action by their endeavours to obtain possession of the village, and that they had received the zamindaree dues of the village from 1206 to 1219 F. S.

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The Senior Judge was of opinion that the documents filed by the respondents were insufficient to prove their right to the village, and that the documents filed by the appellant, among which were pottas granted to Ghazee Khan the grandfather, and Abdoola Khan the father of the appellant, by the former *aumils*, and the depositions of the witnesses of the appellant (who, though in number one less, were in credibility, at least equal, and even superior to those of the respondent) had clearly proved that the grandfather and father of the appellant himself had possession of the village. He therefore recorded his opinion on the 3d of February 1820, that the decision of the Officiating Judge of Cawnpoor should be reversed, and the claim of the respondents dismissed.

The Officiating Judge of the Provincial Court (J. Perry) did not concur in the above opinion. He recorded his opinion on the 18th of February 1820, that the documents produced by the appellant were unworthy of credit, and that the witnesses of the respondents were entitled to greater respect than those of the appellant, and that the decision of the Zillah Court should be confirmed.

The Third Judge (C. Elliot) recorded his opinion, that neither party had satisfactorily proved their right to hold the village as zamindars; but that as it was proved by the evidence of the witnesses of the respondents, and certain documents filed by them, that Uchul Sing and Dhun Sing, their uncle and father, had possession thereof for 20 years; and that there were in the village *topes* and *baghs* planted by them, their claim was superior to that of the appellant, and that they ought to have possession thereof till some person should appear and establish his claim to hold as zamindar: He therefore, in concurrence with the opinion of the Officiating Judge, passed a decision on the 9th of March 1820, confirming the decree of the Officiating Judge of Cawnpoor, and dismissing the appeal with costs.

The appellant being dissatisfied with the decision, applied to the Court of Sudder Dewanny Adawlut for the admission of a special appeal. The Court (present C. Smith, Officiating Judge, and S. T. Goad, Fourth Judge) on perusal of the documents filed with the petition, were of opinion, with the Senior Judge of the Provincial Court, that the evidence produced by the appellant was superior to that produced by the respondent; and that if, as stated by the Third Judge in the Provincial Court, neither of the parties had proved their right, it was more consonant with the practice of the Court to have maintained the appellant in his possession. A special appeal was therefore admitted.

After the admission of the appeal, the appellant died, and Ali Buksh Khan and Ali Moominud Khan, his sons, carried on the appeal. The respondents of the Provincial Court (the original plaintiffs) having also died, Kustoree Sing and Sheo Deen Sing, the sons of the sister of Dhun Sing, and Tej Sing, who was a descendant from the same common great-grandfather of the said

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respondents claimed to be their heirs, the two former under a deed of gift executed by them in their favour, and the latter denying the gift and claiming the village by inheritance.

The proceedings held by the Zillah and Provincial Courts having been received and perused, C. Smith (the Second Judge of the Sudder Dewanny Adawlut) was of opinion, that the documents filed by the parties respectively were equally unworthy of credit, and insufficient to prove that either of them had a right to the estate as zemindars; but that it appeared from certain copies of proceedings held by the Collector of Cawnpoor, that the Board of Commissioners considered that Durya Khan had a better claim to the village than the original plaintiffs, and therefore ordered that a zemindaree potta should be granted to him at the quinquennial settlement of 1220 F. S. He therefore recorded his opinion, on the 19th of January 1824, that the decisions of the lower Courts should be reversed, and that the appellants (the heirs of Durya Khan) should retain possession of the village.

The case was next taken up by J. Ahmety (Officiating Judge), who directed the Provincial Court of Bareilly to cause further evidence to be taken on certain points, wherein the evidence before the Court appeared to be defective. When the further proceedings held by the Provincial Court under the above order were received, the case was taken up by W. B. Martin, the Fifth Judge, (J. Ahmety having returned to Dacca): after perusing the original proceedings and the further evidence, he was of opinion that the right of the original plaintiffs to hold the village as a zemindaree was clearly proved, and that if Durya Khan had in reality any right to the estate, he would not have failed to present a *durkhast* to the Collector at the settlement of 1210 F. S., praying to be allowed to engage for the village of Chursureh, as he had done for the village of Bhusoolee, or in the event of his having been deterred from engaging by the heaviness of the *jumma*, he, in order to save his right, would have caused his name to be entered in the Collector's records under the column of proprietor. For these reasons he recorded his opinion that the decisions of the Zillah and Provincial Courts in favour of the original plaintiffs should be confirmed. With regard to the disputed claim to the inheritance of the said original plaintiffs, he observed, that under the *vyuvvusha* given by the pundit of the Zillah Court of Cawnpoor, Tej Sing, who was descended from a common great-grandfather, with the deceased plaintiffs, was their legal heir, and should be put in possession of the village, leaving Kustoree Sing and Sheo Deen Sing to try the validity of their claim under the deed of gift by a regular civil suit.

The Officiating Chief Judge (J. H. Harrington), concurring in this opinion, passed a final judgment on the 19th of January 1825, confirming the decisions of the Zillah Court of Cawnpoor, and of the Provincial Court of Bareilly, and directed that Tej Sing, as heir of the original plaintiffs, should be put in possession of the village of Chursureh as zemindar; at the same time leaving Kustoree Sing and Sheo Deen Sing the option of suing him to obtain possession of the estate under the deed of gift pleaded by them in support of their claim. The appellants were ordered to pay the

whole of the costs of suit, except those incurred by Kustoree Sing and Sheo Deen Sing, which were charged to them.

KISHEN DHUN SIRCAR, GOUR HURI SIRCAR, and MUHEMA CHUNDER SIRCAR (Heirs of RUSIKA NUND SIRCAR, deceased), paupers, Appellants,

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versus

MUSSUMMAUT NUJEEBA BEEBEE, *alias* NEEMOO BEEBEE, RAJA ANUND CHUNDER RAI (Son of RAJA MUHINDER RAI) and RADHA MOHUN BANOORJEA, Respondents.

THIS suit was instituted by Rusika Nund Sircar, *in forma* ^{of a talook} _{barred by the rule of limitation, urged by the claimant for omitting to urge his claim at an earlier period being insufficient.} to recover possession of the mouzas Paikpara and Mirzapoor-paeen, pergunna Aurungabad, attached to pergunna Mahmoodshahee; laying his suit at 501 rupees, the annual produce. He stated that the mouzas in question were his purchased talook; that as it had suffered by the encroachment of the river, he, at the time of the decennial settlement of the pergunna in 1197 B. S., was induced to grant a lease of the talook in question for the term of 10 years, from 1197 to 1206 B. S., to Moulogee Bukaoolla, who was employed under the gentleman who was making the settlement, and Khoondkar Usmutoolla, his brother, on the said Moulogee's engaging to effect a reduction in the public assessment thereof, and to pay to him one-half of the profits of the said villages; that the said Moulogee got the jumma fixed at 256 rupees, 15 anas, 3 pie, and paid him the half of the profits according to the terms of his *kuboolyut*: that at the expiration of the lease Khoondkar Usmutoolla refused to give up possession of the talook, and through the connivance of the zemindar, Raja Muhinder Deo Rai, substituted his own name in the records of the zemindaree *cutcherry* as talookdar of the said villages: that he (plaintiff) had intended to institute a suit to recover possession of the talook, but had been forced to fly from his house for four years, and was afterwards confined in the civil jail for balances of indigo: that after his release in 1216 B. S., he petitioned the zemindar to restore his name to the records as proprietor of the said talook, but as he refused to do so, he instituted this action against Nujeeba Beebee, *alias* Neemoo Beebee, the widow of Khoondkar Usmutoolla, who had succeeded him in the possession of the talook, and Raja Muhinder Rai, the former, and Radha Mohun Banoorjea the present zemindar, to recover possession thereof.

Neemoo Beebee stated that the villages in question were purchased by Khoondkar Usmutoolla, her husband, in 1193 B. S., previous to the decennial settlement, from Joogul Kishore Sircar (who had purchased them from Huri Shunkur and others, heirs of Kishen Pershad Sing); that at the decennial settlement of

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Kishen Dhun Sircar and others v. Musummaut Nujeeba Beebee and others. pergunna Mahmoodshahhee in 1197 B. S., the settlement was made with her husband as a dependant talookdar, and that he paid the rent assessed thereon, first through Raja Muhinder Deo Rai, the former zemindar, and afterwards through Radha Mohun Banoorjea the present zemindar, till his death in Jeyt 1218 B. S., when she succeeded him, and continued to pay the revenue in the same manner. She contended, that as the plaintiff had never instituted any suit for the recovery of the villages from the date of her husband's purchase thereof, which was 26 years before the institution of this action, his claim was barred by the rule of limitation.

Raja Anund Chunder Rai, the heir of Raja Muhinder Deo Rai, who had demised, filed a similar answer. Radha Mohun Banoorjea, though duly summoned, failed to appear.

After perusing the whole of the pleadings and documents, and the proceedings held in the case, the Officiating Judge of the Zillah Court was of opinion, that the *kuboolyut* filed by the plaintiff, as having been executed by Mouloovee Bukaoolla and Khoondkar Usmutoolla in exchange for his potta, bore on its face evident marks of forgery: that it was proved by the *kubolas* signed by Heera Shunkur and Joogul Kishore Sircar, the authenticity of which was established by the evidence, that the former sold the talook to Joogul Kishore, and that Joogul Kishore sold it to Khoondkar Usmutoolla: and by the answer of the former zemindar, that the said Khoondkar had possession from the date of his purchase in 1193 B. S., to his death in 1218 B. S., after which his widow had possession: that the copies of certain depositions taken in a former case in which certain lands on the said talook were contested by Usmutoolla and Ram Kaunt Biswas and others, filed by the plaintiff, so far from supporting his claim, confirmed the right of the widow of Usmutoolla. As therefore he was of opinion that Neemoo Beebee had proved that her husband and herself had had possession of the talook from 1193 B. S., a period of 26 years, and as the witnesses named by the plaintiff to prove that he had had possession subsequently to that year could only speak from hearsay, he considered the plaintiff's right of action barred by the rule of limitation, and accordingly dismissed his claim with costs on the 9th of December 1814, and ordered that the plaintiff should be confined in the civil jail for three months, if he did not make good the costs of suit, and that they should be levied from any property which he might hereafter become possessed of.

This decision was confirmed by the Provincial Court of Calcutta, on the 27th of June 1820, and a special appeal admitted on the 22nd of September 1821, by the Second and Officiating Judges (C. Smith and W. Dorin), in opposition to the opinion of the Chief Judge (W. Leycester), for the purpose of enquiring on what the right of Joogul Kishore to sell the talook was grounded, why the witnesses of the plaintiff were declared unworthy of credit, and other matters which appeared to require further investigation. Rusika Nund dying at this stage of the proceedings, was succeeded by the present appellants, his heirs.

The appeal was first taken up by the Second Judge, who was of

opinion that it was clearly proved in the proceedings that Rusika Nund Sircar was the first purchaser of the talook, of which he had sole possession until he gave a lease thereof to Moulogee Kishen Bukaolla and Khoondkar Usmutoolla, and that Joogul Kishore, the brother of Rusika Nund, had no interest therein, and could not therefore sell it to Usmutoolla, so that the possession thereof by Khoondkar Usmutoolla and Neemoo Beebee for so long a period was not under a valid and legal title. He did not consider the statement given by the zenindar, confirming that of Neemoo Beebee, entitled to any credit, as there was a strong presumption of his having connived at the usurpation of Khoondkar. He thought the causes shewn by Rusika Nund for not having brought forward his action at an earlier period (viz. that the lease did not expire till 1206 B. S., and that he was for some time after that engaged in disputes regarding indigo balances, and had been confined in the civil jail for some time in satisfaction of a decree for the said balances) sufficient to preserve to him his right of action. On these considerations he recorded it as his opinion that the decisions of the Zillah and Provincial Courts should be reversed, and a decree passed in favour of the appellants.

The appeal was next laid before the Fifth Judge (W. B. Martin). He observed, that as Joogul Kishore Sircar was alive while the suit was pending in the Zillah Court, if the deed of sale executed by him were in reality a forgery, it had been easy for Rusika Nund to have summoned him, and caused his deposition to be taken as a witness; which he failed to do. With regard to the plea of Rusika Nund's confinement in jail being a sufficient reason for not instituting his suit at an earlier period, he observed, that although he was released in 1216 B. S., he did not institute this action till Jeyt 1218 B. S., which afforded grounds for presuming that he delayed his suit till the death of Khoondkar Usmutoolla. He therefore recorded it as his opinion that the decisions of the inferior Courts were just and should be confirmed.

The Officiating Judge (C. T. Sealy) observed, that the *kuboolyut* filed by Rusika Nund, which was the chief document on which his claim was founded, was not authenticated by any evidence, oral or written, and that the length of time which elapsed during which Neemoo Beebee and her husband had had possession was fatal to the claim of the appellants. In concurrence therefore, with the opinion of the Fifth Judge he passed a final judgment, on the 12th of March 1825, confirming the decisions of the lower Courts, and dismissing the appeal. The usual order in the case of pauper suitors was passed w^t regard to costs.

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MUKHUN LAL, Appellant,
versus
WUZEER ALI, Respondent.

Claim to redeem a village from mortgage; plaintiff allowed to recover half of the village by paying one half of the mortgage money; that being the portion to which he was declared entitled by the law of inheritance, as heir to the original mortgagor.

THE respondent instituted this suit in the Zillah Court of Cawnpoor, on the 31st of December 1819, to recover possession of two-thirds, of the village of Duryapoor Rai Bhan, pergunna Kunoge, by redeeming it from mortgage, and to set aside an illegal sale thereof; laying his action at 504 rupees, 10 anas, 8 pie.

He stated that the village was the hereditary estate of Meer Roshun Ali, who died leaving two sons, Nooroodeen Ali and Buder Ali, and one daughter, Mussummaut Khyroonissa, called also Sajedeh Beebee; who married his (plaintiff's) father, Syud Moohummud: that Nooroodeen Ali having died without issue, Buder Ali and Khyroonissa mortgaged the village in question for 101 rupees, to Thakoor Doss, on the 25th of *Rubee-oos-sani* 1158, F. S., since which time the mortgagee and his heirs had possession; that on the death of Buder Ali without issue, Khyroonissa succeeded to the whole of the property inherited by him from his father, and on her death, her husband Syud Moohummud succeeded thereto as her heir; and on his demise, he, the plaintiff, was now the heir of two-thirds, and Puna, the son of Mussummaut Hingun, daughter of Khuleeloonissa, daughter of Khyroonissa and Syud Moohummud, one-third thereof: that he had frequently endeavoured to redeem the estate, and on the refusal of Mukhun Lal to receive the mortgage money, he appointed Puna Ali his agent, to institute a suit on his behalf to recover possession: but that Puna Ali having instituted a suit in his own name, connived with Mukhun Lal, and executed a deed of sale for the whole village, and filed a *razeenama*. The plaintiff therefore now instituted this suit to recover two-thirds of the village from Puna Ali, the fraudulent seller, Ouseyn Lal the son of Mukhun Lal, the ostensible purchaser, Mukhun Lal the real purchaser and occupant of the village under the mortgage, and nephew of Thakoor Doss the original mortgagee, and others, heirs of the said Thakoor Doss.

An answer was filed purporting to be that of Puna Ali, wherein he stated that he had heard that his ancestors had mortgaged the village to Thakoor Doss: but having no proof, he remained quiet till the plaintiff furnished him with a *souruthal*, or statement of the case, on which he instituted a suit to recover possession from the heirs of the mortgagee: but that having no other document in his possession, and not thinking this *souruthal* sufficient to warrant the hope of a favourable decision, he compromised the dispute, and receiving from the defendants 601 rupees, resigned to them his rights and claim to the village, and filed a *razeenama*. He denied the right of the plaintiff to sue to recover possession of the estate. At a subsequent stage of the proceedings, however, Puna Ali filed a document acknowledging the plaintiff's right to the estate, and stated that Mukhun Lal had fraudulently filed the answer given in his name, without his knowledge.

Mukhun Lal and Ouseyn Lal resisted the plaintiff's claim, and

denied that they held the village under a mere mortgage. They stated that the village had been in the possession of their family for 66 years, having been purchased by Hurepershad *cunoongee*, one of their ancestors, from the former Moosulmaun proprietors thereof, but pleaded their inability to file the deeds of sale, as they were lost when Kunoge was burnt by the Mahrattas, and that at the first settlement after the cession, the village was included in Tilook Munoruthpoor, &c. their hereditary zemindaree. They stated that the plaintiff was not the son of Khyroonissa, but of the third wife of her husband, and consequently, as step-son, had no claim to her estate, and that when Puna Ali instituted his suit, the plaintiff caused a *sooruthal* to be drawn up by the *cagee* of Kunoge, and attested by several persons, wherein it was stated that Puna Ali was the sole heir of Khyroonissa, and signed it himself as attesting witness. With regard to the purchase from Puna Ali, Ouseyn Lal stated, that as his father was at that time very ill, and disputes had been excited by the machinations of their enemies, he, in order to get rid of the claim of Puna Ali, false as it was, satisfied him with 601 rupees, and took from him a deed of sale for the village for that sum, unknown to his father.

The Officiating Judge of Zillah Cawnpoor, after perusing the documents and evidence, was of opinion that it was clearly proved that the village was the hereditary estate of Meer Roshun Ali, and that the plaintiff had possession of the *mutrooka*, or property left by Meer Buder Ali, and had always received the zemindaree dues of the village. He thought the plea of Mukhun Lal that the village was his hereditary estate, totally unfounded, and observed that Mukhun Lal, in his answers to the former suit of Puna Ali, acknowledged the village had been mortgaged to Thakoor Doss his ancestor: and that the acknowledgment of Puna Ali and the silence of the other heirs of Thakoor Doss, the original mortgagee, were corroborating proofs of the plaintiff's right. He therefore passed a decree on the 29th of June 1819, awarding to the plaintiff possession of the village, providing at the same time against the right of any other heirs of Roshun Ali being affected by this decree, and leaving any such the option of suing the plaintiff for possession of their shares. The costs were charged to the defendants.

Mukhun Lal being dissatisfied with the decision, appealed to the Provincial Court of Bareilly. The Third Judge (C. Elliott) was of opinion that there was no proof that the village was mortgaged by Buder Ali and Khyroonissa; or that Wuzeer Ali had any right to claim it, (for he held the acknowledgment of Puna Ali entitled to no credit) and observed, that had such a mortgage existed, it was very improbable that the respondent, who for seventeen years had been employed in the customs at Mendy Ghaut, which is in the vicinity of the village in question, should never have made any attempt to redeem the village by paying off the mortgage. He was of opinion that the appellant had clearly established his right to the village, and that therefore the decision of the Zillah Court should be reversed.

The Senior Judge of the Provincial Court (F. Hawkins) was of opinion that the right of the respondent to possession of the village

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on redeeming the mortgage was clearly proved. He therefore recorded it as his opinion (on the 4th of June 1820), that the decision of the Zillah Court should be amended, and that the respondent should be put in possession of the village on paying to the heirs of the original mortgagee the sum of 101 rupees.

The Officiating Judge (T. Perry) concurring in this opinion, passed a final order on the 15th of June 1820, as proposed by the Senior Judge.

Mukhun Lal, being still dissatisfied, moved the Sudder Dewanny Adawlut for a special appeal. The Court taking into consideration the length of time during which the petitioner had held undisturbed possession of the village, and the fact of Wuzeer Ali having obtained an award for the whole of the village, when he only claimed two-thirds thereof, thought fit to admit a special appeal.

Previously to passing final judgment on the case, the Court ordered that the whole of the proceedings of the case should be laid before the Moohummudan law officers of the Court, with directions to give an answer to the following question:

If Meer Buder Ali, son of Meer Roshun Ali, mortgaged the village in question in 1158 F. S., to Thakoor Doss, for 101 rupees, and if the heirs of Meer Buder Ali are willing to redeem the mortgage, by paying the sum of 101 rupees: if Wuzeer Ali and Puna Ali stand to Buder Ali in the relationship pleaded by the plaintiff; and if it be proved by the evidence of the plaintiff's witnesses, that the house and other property of Meer Roshun Ali and of Meer Buder Ali, and some of the proprietary right of the village in question were formerly in the possession of Syud Moohummud, the father of the plaintiff; and on his death of the plaintiff himself; and if Puna Ali, the son of Mussummaut Hingun Beebee, daughter of Khuleeloonissa, daughter of Khyroonissa, acknowledges the right of Wuzeer Ali, the son of Syud Moohummud by a daughter of Gholam Ali, brother of Roshun (he, Syud Moohummud, having previous to the birth of Wuzeer Ali married Khyroonissa, a daughter of Roshun Ali,) it is demanded, what share of the village in question, the estate of Buder Ali, the mortgagor, will go to Wuzeer Ali the plaintiff?

The law officers stated in reply, that if Khyroonissa, daughter of Meer Roshun Ali, was survived by her husband Syud Moohummud; and if Puna Ali was the son of a daughter's daughter of Khyroonissa, and Syud Moohummud left no other heir but Wuzeer Ali his son: one-half of the zemindaree would go to Wuzeer Ali, and the other to Puna Ali: and if Puna Ali had not transferred his claim to another person, but had given it up to the plaintiff, he would have been entitled to take the whole village.

The case was taken up by the Officiating Chief Judge, (J. H. Harrington) who was of opinion that the proceedings of the case afforded ample proof of the fact of the village having been mortgaged by Buder Ali to Thakoor Doss, for 101 rupees, and that it was at the option of the heirs of the mortgagor to recover possession at any time on paying off the mortgage. Under the *Futwa* of the law officers, he considered Wuzeer Ali entitled to

one-half of the property of the said mortgagor, and accordingly recorded it as his opinion on the 23rd of December 1824, that he should be allowed to recover possession of one-half of the village Mukhun by paying to the appellant the sum of 50 rupees, 8 anas, and that he should be informed that he was at liberty to sue to recover the other half, which had been sold by Puna Ali to the appellant, in right of *shoofa* or preemption. 1825.

The Second Judge (C. Smith) concurred in the opinion given by the Third Judge of the Provincial Court of Bareilly. He did not think it proved that Wuzeer Ali stood in such a degree of relationship to Buder Ali as to entitle him to claim to inherit his property, and observed, that as the village had been in the possession of the ancestors of the appellant since 1158, F. S., it was more than probable that the village was actually sold to them; for he considered it to be very improbable, that had they held it merely as mortgagees, the mortgagor and his heirs should have omitted to recover possession by the payment of so small a sum as 101 rupees. He was therefore of opinion that the decisions of the lower Courts should be reversed, and the claim of the respondent dismissed.

The Officiating Judge (C. T. Sealy) however, concurred with the Officiating Chief Judge, and passed a final judgment on the 14th of March 1825, amending the decision of the Provincial Court of Bareilly, and directing that the respondent should obtain possession of one-half of the village of Duryapoor Rai Bhan, on his paying to the appellant the sum of 50 rupees, 8 anas. The respondent was at the same time informed that he was entitled to sue to recover the share of Puna Ali, by right of *shoofa* or pre-emption, if he thought proper. The costs in the three Courts were charged to the appellant.

1825.

Mar. 15th.

RAM KOOMAR RAI, Appellant,
versus
 RAMPERSHAD BULEA, Respondent.

. Claim to possession of *lakhiraj* land dismissed, the quantity claimed being differently stated in a former summary suit, nine years having elapsed since the dismissal of that suit, and the *taidad* produced in support of the claim not being deemed sufficient proof.

THIS suit was instituted in the Zillah Court of Hoogly on the 6th of September 1813, by Ram Pershad Bulea, as a pauper, to recover possession of 30 beegas, 16 biswas of *dewutter* land, and 18 biswas of *mohutteran* land, total 31 beegas, 14 biswas of *lakhiraj* land, in mouza Chuk Bhysum, parganna Bhursut; and also to recover the mesne profits thereof from the period when he was dispossessed, laying his suit at 1,772 rupees, 14 annas. He stated that the land in question had been held as *lakhiraj* by his ancestors from the year 1765 A. D., until 1210 B. S., (1803-4 A. D.) when Ram Kishore Rai, the farmer of the mouza, dispossessed him: that he instituted a summary suit under regulation 49, 1793, to recover possession, but that the Judge dismissed his claim on the 14th of June 1805, referring him to a regular civil action for the recovery of his right, that Ram Kishen Rai, having obtained the village from the Raja of Burdwan as a *putneet* took, died in 1218 B. S., and was succeeded by Ram Koomar Rai and others, his heirs, the present *putneedars*. He therefore instituted this action against the Raja of Burdwan, the *putneedars*, and several of their *gomustas* and *ryots*, as being the persons who actually dispossessed him, to recover possession, and the mesne profits of the land. He stated that his *lakhiraj sunnuds* had been destroyed by fire in 1206 B. S., but that he had a *taidad*, which he had filed in the Collector's office, in proof of his right to hold the land claimed as *lakhiraj*.

Ram Koomar Rai defended the suit. He stated that the land in question was not *lakhiraj*, but assessable land; and that the plaintiff had taken advantage of his situation, when he held mouza Chuk Bhysum in farm, from 1198 to 1209, B. S., to take the said land from the *ryots*, who cultivated it; but that when Ram Koomar Rai got the farm in 1210 B. S., he also got possession of the land claimed: that the plaintiff instituted a summary suit against him for possession, claiming only 22 beegas, 2 biswas of *lakhiraj* land (and not, as in the present action, 31 beegas, 14 biswas, which discrepancy, he pleaded, afforded strong presumption of the falsity of the claim,) and that the suit being dismissed on the 14th of June 1805, he had allowed a period of about nine years to elapse before he instituted this action. He pleaded that the plaintiff had no right to sue the *ryots* of the land as defendants, and that he had done so in order to deprive him of their testimony as witnesses.

The plaintiff in reply stated that the quantity of rent-free land, to which he was entitled under the *taidad* was 31 beegas, 14 biswas, imputing to inadvertency the error in the summary plaint.

The Zillah Judge being of opinion that the right of the plaintiff to hold the land claimed as *lakhiraj* was clearly proved by the evidence of his witnesses, the age of some of whom exceeded 70 years, and by the production of a *taidad*, or extract from the Collector's register of rent-free lands, passed a decree on the

4th of April 1818, awarding to him possession of the land claimed; but dismissed his claim to the mesne profits, as the amount was not clearly ascertained.

This decision was confirmed by the Provincial Court, and the defendant having petitioned the Court of Sudder Dewanny Adawlut, for the admission of a special appeal, it was admitted on the 25th of August 1821, on consideration of the fact of the summary suit instituted by the plaintiff to recover possession having been dismissed, and the long interval which elapsed between the said dismissal and the institution of this action, and the presumption that he took possession of the land as *lakhiraj*, while he was farmer of the mouza.

The appeal was first taken up by the Third Judge (J. Shakespear). He did not consider the *taidat* sufficient of itself to uphold the respondent's claim to hold the land in question on a rent-free tenure, and observed, that though his witnesses had deposed to the fact of his having held the land as rent-free, yet they were unable to prove that he had possession thereof under a valid *sunnud*. On consideration therefore of these reasons, and the discrepancy between the quantities of land claimed in the present suit, and in the summary suit, and the great delay in instituting this action after the summary suit was dismissed, he did not think the claim of the respondent proved, and recorded it as his opinion, on the 15th of May 1824, that the decisions of the lower Courts should be reversed, and the claim of the respondent dismissed.

The Second Judge (C. Smith) after having called for and perused certain other papers relating to the case, concurred in the opinion recorded by the Third Judge, and passed a final judgment, on the 15th of March 1825, reversing the decrees of the Zillah and Provincial Courts, and dismissing the claim of the respondent. The costs in the three Courts having been charged to the respondent, the order usual in the case of pauper suitors was passed regarding them.

1825.

Ram Koo-
mar Rai, S.
Rampur-
shad Bu-
lia.

1825.

Mar. 21st.

**MUNSA RAM, Appellant,
versus
DHAN SING, SOWAI SING, and MHYPAL SING,
Respondents.**

Claim to set aside a deed of sale dismissed; but the right of third party declared to be not affected by the decree confirming the sale.

MUNSA Ram, the appellant, instituted this suit in the Zillah Court of Cawnpoor, on 17th of January 1816, against Dhan Sing, Meherban Sing deceased, the father of Sowai Sing, and Mhypal Sing, in order to set aside a deed of sale for 13 biswas of mouza Kulgawun, laying his suit at 775 rupees, the amount of the purchase money entered in the deed of sale.

He stated himself to be the proprietor of a 7 biswa share of the said village: that being called upon to furnish security for arrears of revenue due to Government, he applied to Mhypal Sing, who agreed to be security for the arrears, on condition of his executing a deed of sale for 13 biswas of the said village, and that he executed a deed purporting to be a deed of sale for the said 13 biswas, for the sum of 775 rupees, in the names of Dhan Sing and Meherban Sing, the other defendants: that as the defendants had neither furnished the required security, nor paid him the purchase money, he instituted the suit to set aside the deed of sale.

The defendants stated that the plaintiff sold to them 13 biswas of the village for 775 rupees, and having received the purchase money, executed a deed of sale and receipt for the said sum, and had caused the said deeds to be registered in the office of the Register of the Zillah.

It being proved to the satisfaction of the Register of the Zillah Court (H. Blundell) by the documents and evidence of the witnesses, that the plaintiff executed the deed of sale and receipt for the purchase money of his own free will, that he had received the purchase money, and acknowledged the execution of the said deeds in the presence of the Register, when they were registered: he dismissed the claim of the plaintiff with costs on the 17th of February 1819.

The plaintiff appealed from this decision to the Provincial Court of Bareilly, and Teloke Sing presented a petition to the Court, stating that the appellant was proprietor of 7 biswas only of the village in question, and protested against his right to the remaining 13 biswas thereof being affected by the decision in this case.

The appeal having been taken up by the Third Judge of the Provincial Court of Bareilly (C. Elliott) he saw no reason for altering the decision of the Register of the Zillah Court, and accordingly confirmed it on the 17th of April 1820, providing at the same time against the right of the other *putteedars* of the village being affected by the decree. As the *vakeel* of the appellant had wilfully absented himself, it was ordered, that the amount of his fees should be deducted from the costs, which were charged to the appellant.

The appellant presented a petition to the Court of Sudder Dewanny Adawlut, praying the admission of a special appeal, and as the appeal had been dismissed by the Provincial Court in the absence of the *vakeel* of the appellant, and as this had in a for-

mer instance been held a sufficient ground for admitting a special appeal, the Second Judge (C. Smith) was of opinion that a special appeal should be admitted. The Chief Judge (W. Leycester) saw no reason for admitting a special appeal, as the regular appeal had been tried on its merits, and as no injury had been sustained by the petitioner from its having been decided in the absence of his *vakeel*. The Third Judge (S. T. Goad) concurring with the Second Judge, a special appeal was admitted; but on perusal of the whole of the proceedings, the Second Judge was of opinion that the decision of the Provincial Court of Bareilly was perfectly just, and passed a final judgment on the 21st of March 1825, confirming the said decision and dismissing the appeal with costs.

1825.

Munna
Ram,
v. Dhan
Sing and
others.

RAJA SHAM SOONDER MUHUNDER, Appellant,

1825.

versus

KISHEN CHUNDER BHOWURBUR RAI, Respondent.

Mar. 22nd.

THIS suit was instituted on the 17th of October 1817, by the respondent, before the Superintendent of the tributary *mehals* of Zillah Cuttack, under regulation 11, 1816, to obtain possession of the Raj and Zamindaree of Killah Dekenal, one of the tributary estates *mehals*, from Raja Kishen Chunder Muhunder, the brother of Zillah the appellants, who then had possession thereof.

A case of succession to one of the tributary estates of Zillah Cuttack;

The plaintiff stated that the Killah of Dekenal was the hereditary estate of his family, and that the occupant thereof bore the title of Raja, and that according to the custom of the family, by the survival of such, the adopted son of the Raja, would take the estate on his death; that in the event of the Raja leaving neither legitimate nor adopted sons, the brother or brother's son of the deceased, supposing him to have been born in wedlock, would take the estate to the perpetual exclusion of illegitimate sons of the Raja by a *kuneez* or concubine, who, according to the family custom, could never become Rajas. The following is the account he gave of the family: Raja Koonj Behari Bhowurbur Rai, his ancestor, held the estate during his life, and died leaving three sons by his *paat ranee* or principal wife; 1st, Raja Birj Behari, who succeeded him in the estate; 2nd, Benoo Hurree Chunder; and 3d, Mutgunge Sing. Raja Birj Behari having no issue, adopted his nephew Jugurnath Bhowurbur Rai, the son of his brother Benoo Hurree Chunder, who, on his death, became Raja of Killah Dekenal. He had two legitimate sons: Bhojbull Sawunt, the father of the plaintiff, and Man Sing Bhowurbur Rai. After enjoying the estate for some years, he formed a determination of resigning worldly affairs, and of ending his life in pilgrimages to Benares, Bindrabund and other holy places. As his two sons were incapable, the elder from ill health and weakness of intellect,

1825.

Raja Sham Soonder Muhunder v. Kishen Chunder Bhowurbur Rai. and the younger from his extreme youth, of managing the estate, he resigned the Raj and Zemindaree into the hands of Tirlochun, son of Mutgunge Sing, and after committing to his charge his two sons, assumed the garments of a *Byragee*, or religious mendicant, and proceeded on his pilgrimage. Raja Tirlochun faithfully protected the sons of his predecessor, and held the estate till his death, when Dianidhi Bhowurbur Rai, his son by his *paat ranee*, succeeded him, and appointed his illegitimate half-brother Ram Cliunder, Bikshee of the troops. Raja Dianidhi having died without issue, Man Sing, who, according to the family custom, was entitled to succeed, became Raja, and was confirmed in his title and estate by a *sunnud* of Maharaja Rugoojee Bhoonsla, the Raja of Berar. As he had no legitimate sons, he, in the year 1205 *Umlee*, adopted the plaintiff (his nephew) as his son, and enjoyed the estate till 1208 *Umlee*, when Ram Chunder, having corrupted the sepoys of the family, who were under his command, seized upon Raja Man Sing, and put him to death, and usurped the Raj and Zemindaree, under the title of Ram Chunder Muhunder. On this the *paat ranee* of the murderer Raji fled with the plaintiff, who was then very young, to the Raja of Killah Hindole: and made a representation of the case through the agency of the Raja of Kindeapara to Rugoojee Boonsla, who immediately granted a *sunnud* in favour of the plaintiff, as rightful successor to Raja Man Sing, and issued a *purwanna* to Sudasleo Rai Sahib, the governor of the province, directing him to punish the usurper, and put the plaintiff in possession of the estate. The execution of this order having been delayed, the district of Cuttack was ceded by the Raja of Berar to the British Government, so that it was never carried into effect. In the year 1219 *Umlee*, the usurper Ram Chunder fell sick, and repenting of the murder of Raja Man Sing, determined to make the plaintiff all the amends in his power, he therefore delivered the *dund chhuttur* (kettle drum and umbrella) and other insignia of the Raj, into the hands of Pattoo Soobdee his Dewan, with orders to deliver them to the plaintiff, to whom he at the same time gave a *chitta* or letter, declaring that he had no son capable of succeeding him, all his sons being illegitimate, and that the plaintiff was the legal heir to the estate, which he said he intended to resign, and prayed him to come to him without delay. On hearing this, Kishen Surun, an illegitimate son of Ram Chunder by a female of the barzer cast, removed his father by poison, and usurped the estate, assuming the title of Raja Kishen Chunder Muhunder, put to death the Dewan Pattoo Soobdee, and Rutnacur Sri Chunjun, a relation of the plaintiff, and seized upon the property of Dhurup Sing and other bramins, the *gooroos* and *purohits* of the family; sparing their lives in consideration of their being bramins. The plaintiff, who had received the letter, had arrived at Manea Bund, when he heard of the usurpation of Kishen Surun. He returned to Kindeapara, where he heard that the usurper had petitioned the Collector to have his name substituted for that of his father. The plaintiff also urged his claims in a petition given in through a *mokhtar*, but being desired to attend in person on the Collector, he came to Cuttack for that

purpose; when he and several of his dependants were put into confinement by Kashi Nath Mullick, the Collector's Dewan, who had been highly bribed by the opposite party. After a mock investigation, during which what fell from him and his witnesses was distorted by the Dewan, so as to serve his purposes, the name of Kishen Surun was entered in the Collector's records as Raja and Zemindar of Killah Dekenal, under his assumed name of Raja Kishen Chunder Muhunder. After several ineffectual representations to the Collector and Board of Revenue, the plaintiff presented a memorial to the Governor General in Council, stating the circumstances of his case, and praying for redress, on which he was directed to institute a suit before the Superintendent of the tributary *mehals* of Zillah Cuttack, under regulation 11, 1816. He accordingly instituted the present action in order to obtain possession of Killah Dekenal, the tribute or *peshcush* paid thereon to Government being 4,780 rupees, 5 annas, 15 gundas, 2 pie, *per annum*, and to recover from the defendant the sum of 240,219 rupees, 10 annas, 4 gundas, 2 pie, being the amount of the mesne profits from the year 1219 to 1224, *Umlee*, both inclusive. He laid his suit at 245,000 rupees.

The defendant resisted the claim of the plaintiff, 1st, on account of the cognizance of the suit being barred, and 2nd, from the absence of all right on the part of the plaintiff. On the first point he observed, that as the cause of action arose prior to the 14th of October 1803, the cognizance of the suit was barred by the express terms of section 4, regulation 11, 1816; and that it was also barred by a former decision of the Governor General in Council, by which his (defendant's) right had been distinctly recognized, and the claim of the plaintiff declared to be unfounded and inadmissible. On the second point, he stated, that neither the plaintiff nor Man Sing, from whom he deduced his claim on the plea of adoption, were connected with the family by blood, they being the sons of *Paiks* in the employ of the Rajas of Dekenal. He denied that adopted sons succeeded to the family estate, and stated that, according to the custom of the family, the eldest son of the deceased Raja, whether he were the son of a *paat ranee*, a *phool beahi* or *mahadye ranee*, would take the estate, and that in default of sons, it would go to the next of kin. In order to illustrate his right to the estate, he gave the following account of the family :

Raja Koonj Beharee had three sons: viz. 1st, Raja Birj Beharee who succeeded him: 2nd, Dhunee Mutgunge Sing; and 3d, Pur-sotum Bidheadhur. Raja Birj Beharee had no sons by his *paat* or first *ranee*, but left two sons named Dumodur Bhowurbur Rai, and Diamdhi Chuttra, by a *mahadye ranee*: Raja Dumodur Bhowurbur Rai succeeded his father, and dying without issue, was succeeded by his brother Diamdhi, who also died without leaving a son. On this the ruling power considering Terlochun Sing the son of Dhunee Mutgunge, next heir to the estate, put him in possession, and installed him on the *musnud*, under the title of Raja Terlochun Muhunder Buhadoor. He held the estate for forty-five years, when he died, leaving two sons, viz. Diamdhi by his *paat ranee*, and Ram Chunder by a *phool beahi ranee*. Diamdhi suc-

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Rai.

1825. ceded his father by the title of Raja Diamdhi Muhunder Buhadoor, and dying without issue in the year 1207 *Umlee*, six years after Raja Sham his accession, was succeeded by his half-brother, Ram Chunder, Soonder Muhunder v. Kishen Chunder Bhowurbur Rai. the father of the defendant, who was confirmed by the ruling power, Maha Raja Rugoojee Bhoonsla. He had possession of the estate when the province was ceded to the British Government, and he retained it till his death, which occurred in 1208 *Umlee*, when the defendant, his eldest son, succeeded to the estate, and was acknowledged by the ruling authorities; his name having, on the death of his father, been entered in the books of the Collector's office as Raja and Zenindar of Killah Dekenal. With regard to the death of Man Sing, he stated, that on the death of his uncle Raja Diamdhi, Man Sing and others conspired to destroy his father, and seize the estate, but that his father receiving timely warning, represented the case to Ulkajee Sookdeo (who, the defendant stated, was then governor of the country under Rughoojee Bhoonsla; and not Sudasheo Rao, as affirmed by the plaintiff), who sent his own body guard, and seized the conspirators, and put them to death for their crimes. He affirmed, that the story of the death-bed repentance of his father, the bequest by him of the estate to the plaintiff, and the other facts connected therewith, to be a gross fabrication; inasmuch as no guilt could attach to Ram Chunder on account of the death of Man Sing, the latter having been executed by the ruling power on account of his crimes, and that he was, for some time before his death, in such a state of weakness both of mind and body as to be unable to make a legal bequest of his property.

The plaintiff in his reply pleaded that the fact of the bequest of the property made in his favour by Ram Chunder at a period subsequent to the date fixed for the cognizance of suit, by section 4, regulation 11, 1816, and his frequent applications to the ruling power for redress, rendered his claim cognizable. The remainder of his reply consisted merely of denials of the facts alleged by the defendant, and assertions of the truth of what he himself affirmed.

The plaintiff named several witnesses to prove the facts alleged by him, and filed the following documents in support of his claim: A letter written in the *Ooreea* language and character, on the leaf of the *Taur* tree, purporting to be written by Raja Ram Chunder to the plaintiff, stating that his son Kishen Surun, being illegitimate, was incapable of succeeding to the estate, and praying him to come and take possession thereof; and acknowledging that the murder of Raja Man Sing and usurpation of the Raj, lay heavy on his mind. This document was dated the 10th of *Assin* 1219, *Umlee*. A list of the family property, also written on the leaf of the *Taur* tree in the *Ooreea* language and character, stated by the plaintiff to have been sent to him by Raja Ram Chunder with the letter: A *sunnud* in the *Mahratta* language and character, purporting to be an acknowledgment on the part of Maharaja Rugoojee Bhoonsla, the Raja of Berar, of the validity of the plaintiff's right to the estate in succession to Raja Man Sing, granted on an application of the plaintiff's mother. This document bears two octangular seals, one large and the other small, the impressions of which are illegible, and is dated 12th of *Rubbee-ool-Akkir* 1190,

era unknown. A copy of 25 interrogatories put by the Superintendent on a former occasion, to the Rajas of the tributary *mehals* of Cuttack, regarding matters of succession, marriage, &c. according to the established custom of their families, with the answers of the Rajas. From the replies of the Rajas it appeared they had stated unanimously, that on the death of a Raja, his eldest son, whether born of the first or any other *Ranee*, would succeed to the estate, and that in default of sons, the brother or next of kin would succeed the deceased Raja; that the son of a *kuneez* or *kusbee* was not entitled to the estate, though instances had occurred under the Government of the Mahrattas, in which the regular line of succession had been broken through, and *kuneez-zadus* had, by distributing money among the *paiks* and other servants of the family, got possession of the zemindaree: and that the widows of the deceased Raja, who survived him, and his younger sons and brothers, were entitled to receive maintenance from the Raja. A memorial presented by the plaintiff to the Governor General in Council, containing a statement of his case, and a prayer for redress; with an order permitting him to sue the defendant under regulation 11, 1816.

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Rai.

The defendant filed the following documents: Copy of a letter from the Chief Secretary of Government to the Board of Revenue, dated 26th of November 1812, stating that the Governor General in Council, after perusing the evidence laid before him, was of opinion that the present occupant of Dekenal (the defendant), whose father had possession of the estate prior to the cession of the province, should be maintained in possession, and that the claim of the plaintiff to the estate was unfounded and inadmissible: Copy of a letter from the Secretary of the Board of Revenue to the Collector of Cuttack (W. Trower) dated 4th of December 1812, transmitting copy of the preceding letter, and directing him to conclude the necessary arrangement with the defendant for the tribute of Dekenal: Copy of a *roobukree* of the Collector of Cuttack (W. Trower) ordering, under the authority of the above letters, that the name of the defendant should be substituted in the books as Raja and Zemindar of Dekenal, in lieu of his father's, and that he should pay to Government annually the sum of 4,780 rupees, 5 anas, 15 gundas, and 2 cowries, the tribute assessed on the estate: Copy of a *roobukree* of J. Richardson and W. E. Ward, Commissioners, dated 27th of January 1814, held in an action brought by the present plaintiff against the defendant in this case for possession of the zemindaree of Dekenal, dismissing the claim of the plaintiff on the ground of the question of right having been already decided in favour of the defendant.

The plaintiff named several witnesses to prove the facts urged by him in support of the claim. As several of them were Rajas of the tributary *mehals*, the Superintendent did not think it proper to summon them to give evidence in person, but issued *purwannas* directing them to give written answers to certain interrogatories.

The Raja of Kindeapara stated in his answer, that the plaintiff and Raja Man Sing were of the Dekenal family; that Man Sing

1825. adopted the plaintiff, and was murdered by Ram Chunder, who usurped the estate : that the defendant was the son of the usurper by a female of the barber cast, and that the Rajas of the other Killahs would not associate with him on that account : that *kuneez-zadas* were not entitled to succeed to the tributary estates, and that a *phool-beaki ranee* was esteemed in a little higher light than a *kuneez* or concubine. These assertions were corroborated, though not unanimously, by the Rajas of Killahs Bankey, Narsingpoor, Burombah, Sokindeh, Talcher, and Runpoor. The Raja of Kindeapara corroborated the statement of the plaintiff with regard to the bequest of Ram Chunder in his favour, and the other facts connected therewith.

The defendant rested his claim to the estate on the former decisions passed in his favour. He objected to the evidence of the Rajas of the Killahs abovementioned being received, as they had not been sworn to the truth of their depositions, and were personally hostile to him, and prayed the Superintendent, if he thought fit to proceed in the investigation, notwithstanding the former decision, would depute a *mohurrir* to re-examine them on oath in the presence of the *mokhtars* of both parties.

The original defendant having demised at this stage of the proceedings, the plaintiff, stating himself to be the only surviving heir of the family, prayed that he might be put in possession of the estate ; or that it might be attached by the Collector till the final decision of the suit, in order to prevent evil-disposed persons injuring the property. A counter-petition was filed by Sham Soonder Muhunder, who stated, that on the death of the original defendant, he, the half-brother by the father of the deceased, had become Raja, with the consent of his widows, and prayed that his name might be substituted for that of the deceased. The Superintendent directed the Collector to continue the name of the deceased in his books, and receive the tribute assessed on the estate till further orders from Sham Soonder, the occupant thereof. He, at the same time, called upon Sham Soonder to appear in person before him and establish his relationship to the deceased : but on his failing to do so on the plea of sickness, he proceeded to try the case in his absence.

On consideration of all the facts stated by the plaintiff, and the documents and evidence adduced by him in support of his claim, the Superintendent was of opinion that the plaintiff's right to the estate was clear and unimpeachable, and that the claim of Kishen Chunder Muhunder, the deceased defendant, being founded on his forcible usurpation of the estate, on the death of Ram Chunder, was untenable. He did not therefore consider it necessary to take evidence of the relationship of Sham Soonder, but passed a judgment in favour of the plaintiff on the 3rd of May 1823, awarding to him possession of the Raj and Zemindaree of Dekenal. The costs were charged to Sham Soonder.

The appellant, having proved himself to be the brother and next heir to the deceased defendant, appealed from the decision of the Superintendent to the Court of Sudder Dewanny Adawlut, where the appeal was admitted under section 11, regulation 11, 1816. He pleaded that the claim of the plaintiff had not been

established by legal evidence, as the witnesses were not examined either on their oath, or on *hulufnames*, or in the presence of the *vakeels* or *mokhtars*; that the Rajas who had given evidence in this irregular manner were hostile to him and his deceased brother: that the letter on which the respondent founded his right had been prepared subsequently to the former decision, or it would have been alluded to, and produced by him in proof of his claim, which a reference to the proceedings would shew was not done: and that in short the claim of the respondent was not proved by the investigation made by the Superintendant, and was barred by the former decision passed by the Governor General in Council in favour of his brother.

The respondent urged no new pleas. With regard to the letter, he asserted, that he did not produce it before the Collector, because he perceived that Kashi Nath Mullick, the Collector's Dewan, had been bribed by the opposite party, and feared that he would destroy it. He also asserted that the appellant had no right to carry on the appeal, as he was not a legitimate brother of the deceased defendant, and that the witnesses whom he had brought forward to prove himself his heir, were his private servants, and had given false evidence in his favour.

After mature deliberation on the case, the Court (present J. H. Harington and C. Smith) observed, that there were two periods at which the cause of action might be held to originate; viz. the death of Man Sing and the occupancy of the estate by Ram Chunder; and 2ndly, the time of writing the letter, viz. in Assin 1219 *Umlec*. With regard to the said document and the bequest of the property therein contained, the Court observed that the date of the document did not agree with the date assigned to that transaction in other papers relating to the case: that the respondent did not produce this document, or even mention the existence thereof, while the case was undergoing an investigation before the Collector, in A. D. 1812, though it may be supposed that he would have brought forward the strongest proof in his power in support of his claim: and that it was almost incredible that Raja Ram Chunder should have confessed himself to be, and held himself up to the eyes of the world, as a murderer and usurper, as he is stated to have done; and that this fact could not be believed, or the letter received as a legal document, unless supported by the most positive and unimpeachable evidence.

The Court accordingly rejected the letter as a fabrication, so that the only ground on which the respondent could now rest his claim was in right of succession to Raja Man Sing; as however Raja Ram Chunder had possession of the estate of Dekenal at the time of the cession of the district of Cuttack to the British Government, and for nine years after, the cognizance of his claim was barred by section 4, regulation 11, 1816; the Court therefore passed a final judgment on the 22nd of March 1825, reversing and annulling the decree of the Superintendant of the tributary *mehals*; and dismissed the claim of the respondent with costs.

1825.
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Mar. 22nd. MUZUFFER ALI KHAN, (for himself, and as guardian of
AMEER ALI KHAN and FURZUND ALI KHAN, minor sons of
HIMMUT ALI KHAN, his deceased brother), Appellant,

versus

FAKEER CHAND, SHEO BUKSH, HURREE LAL and
SHEIKH WULLEE MOOHUMMUD, Respondents.

Claim to set aside the award of arbitrators after a silence of ten years dismissed. THE original suit was instituted in the Provincial Court of Patna, on the 14th of July 1817, by Mozuffer Ali Khan and Hammud Ali Khan, to recover from the respondents possession of 230 beegas, 6 biswas of land, situated in the villages of Sandookoor, Tunria, Bhattachapur, and Nundpaliee, pergunna Puchlakha, Zillah Sarun, containing fruit trees, and to recover the mesne profits thereof from 1215 to 1224 F. S., laying their action at 7,001 rupees, 14 anas, 6 pie, being three years produce of the land, the value of the trees and the amount of the mesne profits claimed.

The Fourth Judge of the Provincial Court of Patna (W. M. Fleming) observed, that it appeared from the proceedings and documents filed by the parties, that a dispute having arisen respecting the boundaries of the lands of the parties, which were adjoining, Sheikh Abdool Ali, the *mokhtar* of the plaintiffs, agreed to submit the decision of the case to arbitration, and that four arbitrators having been appointed, gave their award on the 1st of December 1807, by which it appeared that the contested land belonged to the defendants Fakeer Chund, Sheo Buksh and Hurree Lal (who defended the suit, Sheikh Wullee Moohummud, from whom the other defendants acquired the land by purchase, not appearing to defend the suit, though duly summoned); that the plaintiffs made no mention of the arbitration in their petition of plaint, but in their reply to the answer of the defendants denied that Sheikh Abdool Ali had any power to submit the dispute to arbitration, and wished to call witnesses to set aside the award; and that he also prayed that the lands of the defendants might be measured in order to ascertain whether or not they had possession, in addition to their own lands, of the land or any part of the land belonging to them (plaintiffs.)

He (Mr. Fleming) was of opinion, that the measurement of the land of the defendants would not prove the right of the plaintiffs to the land claimed by them, as villages were, on measurement, frequently found to contain a larger portion of land than was entered in their *rukbus*: and that it was now too late for them to object to the award of the arbitrators, as the defendants had had undisturbed possession of the land claimed by the plaintiffs from the date of the award to the date of the institution of the suit, a period of upwards of ten years: and that as they had failed, immediately on being dispossessed, to institute a suit under regulation 49, 1793, and to appeal from the award of the arbitrators within the period allowed by the regulations, their neglect was a bar to their appeal from the said award, and to their claim for possession of the land in question. He therefore dismissed the claim with costs on the 2nd of August 1821.

Hammud Ali Khan having demised, Muzuffer Ali Khan, his

brother, appealed from this decision on his own behalf and as guardian of the minor sons of his brother. His chief grounds for appealing were his denial that Sheikh Abdool Ali was authorized to submit the dispute to arbitration, and other pleas impeaching the award of the arbitrators, which had not been investigated in the Provincial Court. He also pleaded, that he and his brother had been induced to delay the institution of this suit by the hopes given them by the opposite party of an amicable adjustment of the dispute.

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Muzaffer
Ali Khan
and others
v. Fakeer
Chand and
others.

The appeal was taken up by the Second Judge (C. Smith). He was of opinion that the plea of the appellant, that he had been induced to delay the institution of this suit by the hopes held out by the respondents of an amicable adjustment of the dispute, was unworthy of credit; as it was not to be believed, that a person ousted from his lands should trust to the justice of the person who ousted him, to regain possession; and as it appeared from the appellant's own shewing, that although he was ousted in *Ughun* 1215 F. S., he instituted no action to recover possession of his lands, or to set aside the award of the arbitrators till the month of *Sawun* 1224 F. S., being a period of upwards of ten years, his right of action was barred. He therefore passed a judgment on the 22nd of March 1825, confirming the decision of the Provincial Court of Patna and dismissed the appeal with costs.

**RAM JYE GOSAIN, the WIDOWS of RAM MOHUN GOSAIN, 1825,
deceased, and MUSSUMMAUT KOROONA MYE, Appellants,**

versus

Mar. 31st.

MUSSUMMAUT RAM RANEE DIBEA, Respondent.

THE following genealogical table will elucidate the case:
DOORGA RAM GOSAIN:

Ram Chund Gosain,	Jugunnath Gosain died leaving a widow, A- nund Mye, nee, who is dead.	Mussum- maut Ko- roona Mye, claimant,	Ram Jye Gosain, de- fendant.	Ram Mohun Gosain, defendant.	Kishen Gosain.
Byjnath Gosain died leav- ing a wi- dow, A- nund Mye, nee, who is dead.	Jugunnath Gosain died leaving a widow, A- nund Mye, nee, who is dead.	Mussum- maut Ko- roona Mye, claimant,	Ram Jye Gosain, de- fendant.	Ram Mohun Gosain, defendant.	Kishen Gosain.

The wi-
dow of a
sister's son
(on whom
the estate
had devolv-
ed) takes
the estate
according
to the Hin-
doo law to
the exclu-
sion of the
sister her-
self.

Ram Ranee Dibea instituted this suit in the Zillah Court of the Suburbs of Calcutta on the 26th of June 1813, to recover from Ram Jye Gosain and Ram Mohun Gosain possession of 22 beegas, 14 biswas of *birmooter* land in mouza Balee, pergunna Boroo, together with the mesne profits thereof from 1211 to 1219 B. S., laying her action at 525 rupees, 2 anas. She stated, that on the death of Doorga Ram Gosain, the maternal great-grand-

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Ram Jye
Gosain and
others, v.
Mussum-
maut Ram
Ranee Di-
bea.

father of Ram Lochun Banorjea her husband, Ram Chund Gosain, his eldest son, took a four ana share of his property, consisting of 25 beegas, 5 biswas of *birmooter* land in the village in question, which share devolved on her husband on the death of Byjnath Gosain, and Jugunnath Gosain, his maternal uncles and their widows; that he sold 2 beegas, 11 biswas thereof, and died in *Cheyt* 1211 B. S., when the defendants took possession of the remainder of his share, 22 beegas, 14 biswas. She therefore instituted this suit to recover possession of the said land and the mesne profits.

Mussummaut Koroona Mye, the mother-in-law of the plaintiff, claimed the property in question as the estate of her father Ram Chund Gosain, which came into her possession by the death of her brothers and their widows; and stated that the defendants, on the death of her son Ram Lochun Banorjea, took advantage of her unprotected state and dispossessed her from the said property, with the exception of her dwelling-house; that she appointed Kala Chand Mokerjee, the father of the plaintiff, her son's widow, her *mokhtar*, to sue them for the recovery thereof; but that he had fraudulently instituted this action in the name and on behalf of his daughter. Ram Mohun Gosain did not appear to defend the suit.

Ram Jye Gosain answered to the plaint: he stated, that after the death of Byjnath Gosain, his brother Jugunnath Gosain, and his widow Rutna Munee and Anund Mye, the widow of Byjnath constituted himself and his brother her heirs; and that they in conformity with a dying request of Jugunnath, gave to Koroona Mye, the full sister of Jugunnath Gosain and mother-in-law of the plaintiff, 3 beegas of rent free land for her support; after which neither she nor the plaintiff, who was a childless widow, were entitled to any share in the inheritance.

At a subsequent stage of the proceedings the plaintiff filed a deed executed by Ram Jye Gosain on behalf of himself and his brother, acknowledging the plaintiff's right to the land in question as heir of her husband.

The Acting Register of the Zillah Court was of opinion, that it was proved that the property in question was the estate of Ram Chund Gosain, the maternal grandfather of the husband of the plaintiff. In order to ascertain how the estate of Ram Chund Gosain would devolve, according to the Hindoo law, he took a *vyuvustha* from the pundits of the Provincial Court, which being submitted to the pundits of the Sudder Dewanny Adawlut, at the instance of Koroona Mye, was confirmed by them. It was in substance as follows, "if there be neither a son, a son's son, a son's grandson by a son, nor a daughter's son, and if the daughter of the original proprietor be still alive, the property will devolve on the widow of the daughter's son, and not on the daughter herself." In conformity with this *vyuvustha* he passed judgment in favour of the plaintiff, on the 1st of August 1816, awarding to her possession of the land claimed, and the sum of 255 rupees, 6 annas, mesne profits received by them from the said land during the period it had remained in their possession. The costs of suit were charged to the defendant, with the exception of the fee of the *vakeels* of Koroona Mye, which she was directed to discharge.

The defendants appealed from this decision to the Provincial Court of Calcutta, and Ram Mohun Gosain dying, his widow carried on the appeal in his place. Mussummaut Koroona Mye also appealed from the decision.

The Second and Third Judges of the Provincial Court (C. T. Sealy and A. B. Tod) for the reasons given in their decree, were of opinion that the decision of the Officiating Zillah Register was perfectly just, and accordingly confirmed it (on the 10th of December 1821,) and further provided that the respondent should receive from Ramjye Gosain, and the heirs of his brother, mesne profits in addition to the sum awarded by the Zillah decree, until she was actually put in possession of the land, at the rate of 28 rupees, 6 annas, 8 gundas *per annum*. The costs in the Provincial Court were charged to the appellants.

They being still dissatisfied, a special appeal was admitted by the Sudder Dewanny Adawlut, on their motion, for the purpose of further consideration of the Hindoo law as applicable to the case. On mature deliberation, however, of the whole of the proceedings, the Court (present C. Smith) saw no reason to alter the decisions of the Zillah and Provincial Courts, and accordingly confirmed them and dismissed the appeal with costs on the 31st of March 1825.

MOOHUMMUD AMEENOODEEN and RAM MOHUN
CHUKERBUTTY, Appellants,

1825.

versus

MOOHUMMUD KUBEEROODEEN, Respondent.

Mar. 31st.

THIS action was instituted on the 4th of September 1819, in the Provincial Court of Dacca by the appellants, in order to recover from the respondent possession of a 5 ana, 6 gunda, 2 cowrie, 2 krant share of pergunna Umberabad, a *malgozare mehal*, and a similar share of certain rent-free *mudud-mash* villages, situated in pergunna Umberabad, and other pergunnas of the district of Tippera, and a pension payable from the Collector's office, being the property left by Syfoonissa, under a will executed by her, whereby she bequeathed the whole property, real and personal, to Ameenoodeen Khan, and appointed Ram Mohun Chukerbutty executor.

From the statement of the plaintiffs it appears, that Khyroonissa, one of the wives of the late Kazee Zuheerodeen, inherited from her father a third share of pergunna Umberabad, and that she succeeded to one-third share of the *mudud-mash* villages left by her husband, in right of her son Buderoodeen, whom she survived; that Buderoodeen left a son Kummuroodeen, who died at the age of eight or nine years: that Khyroonissa, being childless, made over the whole of her property to Syfoonissa, widow of Buderoodeen, and mother of Kummuroodeen, on the 22nd

A will upheld by which a Moosul-maun female bequeathed the whole of her property to a stranger. The testatrix having no heirs, the legatee took the whole of her property.

Had she left objecting heirs, two-thirds of the property would have gone

1825.	<p>of <i>Sawun</i> 1203 B. S., executing two separate deeds of gift; one for the <i>malgoozaree</i>, and the other for the rent-free estates and the pension, which deeds were duly registered in the Zillah Court of Tippera: that Syfoonissa had possession of the property till her death: that she, on the death of her son, being childless, took Ameenoodeen Khan, who was then but four years old, into her house and educated him as her son; and some time before her death, on the 15th <i>Phagoon</i> 1223 B. S., executed a will, bequeathing to him the whole of her property, real and personal, and appointed Ram Mohun Chukerbutty, who had managed the estate as <i>gomashta</i> during the time of her mother-in-law and herself, executor of her will, and manager of the estate for Ameenoodeen Khan: that on the death of Syfoonissa in <i>Bhadoon</i> 1224 B. S., the plaintiffs had possession of the property, till the defendant, the son of a half brother of the husband of the deceased, presented a petition to the Collector claiming the property, on which the Collector, after a summary enquiry, entered his (defendant's) name in the records of his office as proprietor, and this order being confirmed by the Judge, possession of the whole property left by Syfoonissa was delivered over to the defendant: that after appeals had been preferred to the Provincial Court and Sudder Dewanny Adawlut, the latter Court confirmed the Judge's order, leaving the party out of possession to institute a regular suit under the provisions of regulation 5, 1799, for the adjustment of their claims. The plaintiffs accordingly instituted the present action for the recovery of the landed property and the pension (leaving the personal property for another suit), laying their action at three years produce of one-third share of pergunna Umberabad and its dependencies,</p>	RS. A. P. G.
	paying annually to Government, the sum of 1,942. 11. 2.	5,828 1 7 2
	Eighteen years produce of the rent-free lands producing an annual sum of 842. 8. 0 0....	17,165 0 0 0
	A pension payable by the Collector amounting to <i>per annum</i>	1,966 10 13 1

Making the sum total of Sa. Rs. 24,959 12 0 3

The defendant denied that Syfoonissa either had a right to bequeath, or that she did bequeath the property in question to Ameenoodeen Khan. He stated that his grandfather, Kazee Zuheeroodeen, who possessed the *mudud-mash* villages, had three sons by different wives, viz Wasiloodeen, the father of the defendant, Ussuroodeen and Buderoodeen, who each took one-third of his property; that on the death of Buderoodeen, Khyroonissa, his mother, took his share of the *mudud-mash* villages, and had possession of one-third of pergunna Umberabad, to which she had succeeded, in right of succession to her father: that she, after her son's death, made over the whole of her estates by a deed of gift dated 28th of *Sawun* 1192, B. S., to Kummuroodeen her grandson, and gave him possession, causing his name to be used in the *mofussil* and at the *sudder* station, as proprietor of the estates: that the gift was irrevocable under the Moohum-mudan law, and on the death of the donee, his father's relations

were entitled to the estates as his heirs, and that his (defendant's) father actually did receive a portion of the produce of the estate : that Khyroonissa having once relinquished the property, had no further controul over it, so that the second gift thereof to Syfoonissa was invalid ; that he, as successor to his deceased father, was heir to the property, and that Ameenoodeen being a stranger had no claim to the property, either by inheritance or by right of adoption, which is not recognized by the Moohummudan law. With regard to the will, he stated that it had been forged after the death of Syfoonissa, by Ram Mohun Chukerbutty, who had the seals of Syfoonissa in his possession : that Ram Mohun Chukerbutty, in the first instance presented to the Collector a *tumleeknama*, dated 23d of Phugoon 1223 B. S., under which he claimed the property for Ameenoodeen ; but that being returned to him, he prepared the will, under which the plaintiffs now claim the property. He objected to the validity of the will, as having been attested only by persons of low rank in society, whereas, had Syfoonissa really executed it during her lifetime, she would have had it attested by respectable persons of her own rank, and he urged the fact of a Hindoo being appointed executor to the will of a Mooslim as a good reason for setting it aside. He stated that the plaintiffs, in order to save the price of stamp paper, had rated the *lakhiraj* land too low : that the annual produce thereof was 15,000 rupees, eighteen year's produce of which, 27,000 rupees, would make the sum total of the claim upwards of 34,000 rupees, for which stamp paper value 750 rupees should be used, instead of paper value 500 rupees, on which the plaint was written.

The plaintiffs, in their rejoinder, declared that they had rated the produce of the *lakhiraj* land as they found it, and filed a copy of a security bond furnished by the defendant, when he obtained possession of the said *lakhiraj* land, wherein the annual produce thereof was estimated at 825 rupees, being even less than they had rated it at. They denied the previous gift of the property by Khyroonissa to Kummuroodeen, and urged the following reasons for presuming that the gift had never been made ; that Khyroonissa and Syfoonissa in succession had undisturbed possession of the property for a period of upwards of thirty years after the alleged date of the gift : that none of the heirs of Kummuroodeen claimed the property in question ; during that period, in right of succession to him, and that Ufsuroodeen instituting a suit against Syfoonissa for the recovery of the property in question, claimed it as the estate of Khyroonissa, and on the death of Syfoonissa the defendant claimed the same property, and obtained an order for the entry of his name in the Collector's books as heir to her ; neither of them claiming it in right of inheritance from Kummuroodeen. They stated that Ameenoodeen did not pretend to a right to the property by inheritance or adoption, but under a will, which it would be proved had been duly executed, and respectably witnessed ; and that they mentioned the fact of his adoption merely for the purpose of accounting for Syfoonissa having left her property to him, who was not connected with her by blood. They denied that Ram Mohun Chukerbutty had ever filed a *tumleeknama* before the Collector ;

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stating that he invariably claimed the property under the will, the purport of which might have been overlooked, and the deed erroneously called a *tumleeknama*; and urged that the fact of a Hindoo being executor did not affect the validity of the will.

A person named Ushrufoodeen, who stated himself to be the grandson of Ufsuroodeen, the half-brother of Buderoodeen, put in a claim to a moiety of the property in question, which having been legally vested in Kummuroodeen by the deed of gift, executed in his favour by his grandmother, became on his death the rightful inheritance of his uncles, Wasiloodeen and Ufsuroodeen, who survived him: and he, the grandson of the latter, and the defendant, the son of the former, were each entitled to a moiety thereof.

The plaintiffs filed several documents in support of their claim, which were the following: Copy of a decree of Council, dated the 24th of November 1777, awarding to Ebadoolla two-thirds, and to Khyroonissa one-third of pergunnah Umberabad, the estate of their father, and declaring that on the death of the latter, her share should go to her son Buderoodeen, to the exclusion of his half-brothers, Wasiloodeen and Ufsuroodeen, (the plaintiffs in the case), who were declared to have no claim thereto. Copy of a *purwanna* issued by the Collector of the district, under dates the 3d of October 1788, (20th *Assun* 1795, B. S.) for the separation of the said share of Khyroonissa, from the share of Ebadoolla. Copy of an *umul-dustuk* under date the 7th of August 1790, (25th *Sawun* 1197, B. S.) issued by the Collector, giving Khyroonissa possession of the said share. Copy of a *purwanna* under date the 15th of June 1793, (4th *Assar* 1200, B. S.) issued by the Collector, directing the *Mofussil Talookdars* to consider Khyroonissa as the *Sudder Tulookdar* of the said share. The original *hibehnama* executed by Khyroonissa, whereby she granted that portion (one-third) of the *mudud-mash* lands of her husband, Kazee Zuheeroodeen, of which she had possession in right of her own son Buderoodeen, to Syfoonissa, the widow of the latter, and mother of her grandson Kummuroodeen. This deed was dated the 22nd *Sawun* 1203, B. S. (3d of August 1796), and bore the attestation of the registry thereof in the Zillah Court of Tippera on the 29th of November 1798. The original deed for the share of pergunna Umberabad, of which Khyroonissa had possession, was not forthcoming: the plaintiffs stating that the defendant obtained possession thereof, together with other papers, when the personal property of Syfoonissa was made over to him by order of the Judge of the Zillah Court. An original *purwanna* under date the 14th of April 1800 (4th *Bysakh* 1207, B. S.) issued by the Collector, reciting that Khyroonissa had reported her gift of her property to Syfoonissa, and directing the latter to consider herself as the *Sudder Malgozar* of one-third of pergunna Umberabad, and to pay the revenue assessed thereon to Government. Copy of a *roobakaree* of the Collector, dated 12th of May 1812, (31st *Bysakh* 1219, B. S.) ordering that the name of Syfoonissa should be substituted in the records of his office for that of Khyroonissa, under a deed of gift executed by her in favour of the said Khyroonissa. Copy of a summary decision of the Zillah

*Court of Tippera, dated the 14th of September 1812, (31st 1835.
 Bhadoon 1219, B. S.) in a case wherein Usmutoonissa sued Sy-*

foonissa for possession of the property of Khyroonissa, maintaining Syfoonissa in possession thereof on the ground of her having had possession during the lifetime of Khyroonissa, and leaving the plaintiff and other claimants the option of instituting a regular suit for the establishment of their respective claims. Copy of a petition, under date 14th Cheyt 1219, B. S. (26th of May 1812) presented to the Collector by Syfoonissa, announcing her adoption of Ameenoodeen, and praying that his name might be entered in his records conjointly with her own, as joint proprietor of her estates. The original will executed by Syfoonissa, bearing date the 15th of Phagoon 1223 B. S. (25th of February 1817), whereby she bequeathed the whole of her property, real and personal, to Ameenoodeen, whom she had brought up from childhood as a son, and appointing Ram Mohun Chukerbutty, who, during the time of Khyroonissa and herself had managed the estate as *gomashtha*, executor of the will, and manager as heretofore of the estates, on behalf of Ameenoodeen. They also filed several *mofussil ze nindaree* papers and other documents, to prove that they, on the death of Syfoonissa, had possession and collected the rents of her property.

The defendant, in support of his claim, filed, among others, the following documents: A copy (attested by the seal of a *cazee*) of a deed of gift under date the 28th of *Sawun* 1192, B. S. (11th of August 1786), executed by Khyroonissa, whereby she granted to her grandson Kummuroodeen the whole of her property, real and personal. A copy of a copy of a deed of gift, under date the 22nd of *Sawun* 1203, B. S. (3d of August 1798), executed by Khyroonissa, whereby she granted to Syfoonissa, her share of pergunnah Umberabad, which she had previously given to her grandson Kummuroodeen. The original appeared to have been registered in the Zillah Court of Tippera on the 25th of November 1798. Several *mofussil* zemindaree and other papers, to prove that Kummuroodeen had so far possession of the estate in consequence of the gift, that the collections were made and the affairs of the estate conducted in his name. A *futwa* delivered by certain *cazees*, declaring that a *kafir* or infidel cannot be executor to the will of a *mooslim*.

Several witnesses were examined by both parties in support of their respective claims. After the pleadings and documents filed, and the depositions of the witnesses had been read, the Provincial Court considered the following facts proved: that Khyroonissa had possession of the landed property in question, and made it over by a deed of gift to her grandson Kummuroodeen, and that the rents thereof were collected in his name: that after his death in 1195, or 1196, B. S. Khyroonissa made over the said property by a second deed of gift to Syfoonissa, the widow of her son Buderoodeen, and mother of her aforesaid grandson; that from the time of the death of Kummuroodeen, Khyroonissa had undisturbed possession of the property till possession was given to Syfoonissa, who retained it, till her death, and that she executed a will bequeathing it to Ameenoodeen the plaintiff. The law officer of the Court was required to answer the following questions:

1825.

Mloohum-mud Amee-noodeen Khan and another, v. Mloohum-mud Ku-beeroodeen.

1st, Do these circumstances invalidate the gift to Kummuroodeen, and was Khyroonissa authorized to grant the same property to Syfoonissa? 2nd, supposing the deed of gift executed in favour of Kummuroodeen to be still valid, and Khyroonissa to have had no authority to make the second gift to Syfoonissa, and the surviving relations of Kummuroodeen to have been Khyroonissa his grandmother, Syfoonissa his mother, and Wasiloodeen his uncle (half-brother of his father), who, among these three persons, are entitled to share in his estate, and in what proportions? and supposing Ufsuroodeen, another uncle by half blood of Kummuroodeen, to have also survived him, who, among these four persons, would take shares in his property, and in what proportions?

The law officers of the Court gave the following answers:

1st, The gift to Kummuroodeen is not affected by the circumstances above stated, and Khyroonissa had no authority to make the second gift of the same property to another: for she was a relation within the prohibited degree of Kummuroodeen: a prohibited relation cannot retract a gift, or resume possession of property given: nor can a donor retract a gift after the death of the donee. Hence the second gift of the property by Khyroonissa, to Syfoonissa, and the bequest thereof by the latter to Ameenoodeen, which depends on the validity of the said gift, are both invalid. Moreover *wuseeut*, or the act of bequeathing, is *tumleek*, or the establishment of a proprietary right, which has reference to a period subsequent to the death of the bequeather, and what makes a will obligatory is the use of the word *wuseito* "I have bequeathed," in the past tense, or some other word of a similar import. The will filed in this case contains no expression which can be understood as establishing a proprietary right, or as conveying the sense of "I have bequeathed," so that *wuseeut*, or the act of bequeathing, is not established.

2nd, If Ufsuroodeen survived Kummuroodeen, the property would be divisible into three shares, of which he, Wasiloodeen and Syfoonissa would each take one. If he did not survive him, Wasiloodeen would take two-thirds, and Syfoonissa one-third of the property.

The Court on this *futwa* rejected the claim of the plaintiffs under the will, which was considered invalid, as far as related to the property in question, as resting on the invalid gift of Khyroonissa to Syfoonissa, and dismissed the suit with costs; declaring at the same time that Ameenoodeen was at liberty to sue as heir of Syfoonissa under the will for possession of any portion of the family property of Buderoodeen to which his widow Syfoonissa was entitled under a *kabeen-nama* whereby Buderoodeen made over to her the whole of his property in lieu of dower. This document was filed in this case, but as the plaintiffs did not originally plead it in support of their claim, the authenticity thereof was not enquired into.

An appeal was preferred from this decision by the plaintiffs to the Court of Sudder Dewanny Adawlut. The pleas used by the parties in support of their claims were similar to those urged by them in the Provincial Court. Previously to deciding the case, a copy of the will executed by Syfoonissa was laid before the law

officers of the Court, with instructions to answer the following questions: 1st, was Syfoonissa, whether she had heirs or not, authorized to bequeath the whole of her property by will? 2nd, is the appointment by a *mooslim*, of a person other than a *mooslim*, as executor to his will, correct or not? 3d, if incorrect does it invalidate the will so as to deprive the legatee of his claim to the property? 4th, if, by the Moohummudan law, she was not authorized to alienate by will the whole of her property, what portion of it might she bequeath? and 5th, if she was not authorized to bequeath the whole, is the will valid as far as relates to that part which she had power to bequeath, if it contains a bequest of the whole?

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The following were the answers given by Syud Hamid Oolla Kazee ool Koozaut, and Abbas Ali and Ghoolam Soobhan, *Moftees* of the Court. Answer to question 1st, If Syfoonissa left no heirs, she was at liberty to bequeath the whole of her property: if she had heirs, the bequest of one-third of the property is valid: the validity of the bequest of more than one-third depends on the consent of the heirs of the testatrix. Answer to questions 2nd and 3d: though the appointment of other than a *mooslim* as executor to the will of a *mooslim* is lawful, yet it is incumbent on the *Kazee* to eject him from being executor. The reason why the appointment, though not perfectly correct, is said to be legal, is because his official acts, as executor, are valid, until he be ejected by the *Kazee*. The appointment does not affect the validity of the will as far as relates to the right of the legatee. Answer to questions 4th and 5th: even if Syfoonissa had no authority to bequeath more than one-third of her property, which depends on her having been survived by heirs, who have not given their consent to her alienation by will of more than one-third thereof, the validity of the will is not affected, as far as relates to the bequest of one-third, by her having entered therein the bequest of all her property.

On consideration of all the circumstances of the case, and the *futwa* of their law officers, the Court (present J. H. Harrington and C. Smith) came to the following decision. They were of opinion that Khyroonissa never did give her estates to Kummuroodeen; no original deed of gift being forthcoming, and the copy thereof, filed by the respondent, not being duly authenticated, being insufficient to uphold the claim: that in addition to the absence of positive proof of the gift, the subsequent facts formed strong grounds for the presumption that no such gift was ever made: for had the estate been granted and duly made over by Khyroonissa to her grandson by a deed of gift, (for which act no necessity existed, as he, in the vent of his surviving her, would have succeeded to her property as next heir,) the relations of his father, who were his legal heirs, would not have refrained from claiming his property at his death: they would not have allowed the donor, after having given up the property, to resume possession thereof, which by the Moohummudan law she had no right to do, nor would they have failed to come forward, and object, as heirs of Kummuroodeen, to the second gift of the property to Syfoonissa: That the controul of Khyroonissa over the property was unlimited, and her right to alienate it by gift undoubted, and

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that it was clearly established by evidence that she did make it over by deed of gift to Syfoonissa, who had possession till her death, so that the property in question must be considered as the estate of Syfoonissa: that neither of the parties in the present action could maintain a claim thereto as the heirs of Syfoonissa, as Ameenoodeen was not connected with her by blood, and Kubee-roodeen, being the son of the half-brother of her deceased husband, was not entitled to a share in her estate by inheritance, such a connection being looked upon in the light of a stranger: that it was proved that Syfoonissa had taken Ameenoodeen into her house, while he was very young, and had brought him up as her son, and being aware that he would not by inheritance take any portion of her property after her death, and actuated by a natural partiality for a person whom she had always looked upon as a son, executed the will in his favour, thereby securing to him possession of her property after her decease. As therefore the bequest by Syfoonissa of the whole of her estate in favour of Ameenoodeen had been declared to be valid in the event of none of her heirs appearing to claim it, and as no heir had made his appearance, the Court passed a final judgment on the 30th of March 1825, reversing the decree of the Provincial Court of Dacca, and directing that the appellants should be put in possession of the landed property left by Syfoonissa, and that the pension formerly paid to her should be paid to them. They were informed that they were at liberty to sue the respondent for the amount of the mesne profits received by him during the time he had possession of the property. The costs in both Courts were made payable by the respondent.

THE WIDOWS of RAJA ZORAWUR SING (paupers), Appellants,
versus
 KOONWUR PERTEE SING, Respondent.

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April 21st.

THIS action was instituted in the Provincial Court of Calcutta, on the 9th of February 1816, by Mussummaut Jhalloo Koomari and Mussummaut Sahib Koomari, widows of Raja Zorawur Sing, deceased, late zemindar of pergunna Jurria, one of the jungle estates in the district of the *Jungle mehals*, to recover possession of the said estate from Koonwur Pertee Sing, the brother of the deceased.

The plaintiffs stated, that by the custom of the family of the zemindars of pergunna Jurria, and of the other jungle estates, the eldest son of the late incumbent takes the whole estate, the other sons receiving lands for their support; and that in the event of the zemindar leaving no son, his widows take the estate to the exclusion of his brothers; that in conformity with this custom, Ranee Dussoo Munee took the estate of Nowaghur on the death of her husband, Raja Futtah Sing, elder brother of Raja Mohun Sing, father of Raja Zorawur Sing, their husband: and that on the death of Raja Parusnath, zemindar of the same pergunna, his widow, Ranee Sobhba Munee, took his estate, and being forcibly dispossessed by Koonwur Pertee Sing, the brother of the deceased, sued him for the recovery thereof, and obtained a decree in her favour in the Zillah Court (which decree was confirmed by the Calcutta Court of Appeal,) under which she had possession of the estate. That on the death of Raja Molau Sing, his eldest son, Raja Zorawur Sing, their husband, took the estate of pergunna Jurria, and Koonwur Pertee Sing the defendant, and Thakoor Sing, and Ram Sing, the younger sons of the deceased, received lands for their support: that Raja Zorawur Sing, having no children, executed a deed of gift on the 9th of *Jeyt* 1220, B. S., (12th of May 1813) in favour of the plaintiffs, his second and third wives, and reported his act to the Judge and Collector of the district; that on the death of their husband, which occurred about nine months after, Ranee Surroop Koomari, his senior widow, previous to becoming a *Suttee* (on the 20th *Magh* of the same year, corresponding with the 1st of February 1814,) made over the estate to them, in conformity with the known wishes of their deceased husband, and marked them on the foreheads with a *teeka* (or type) in token of investiture in the presence of many respectable persons; that after they had performed the funeral obsequies of their husband, they reported his death and their accession to the estate to the Collector, and retained possession thereof (and paid one instalment of the public revenue), till Koonwur Pertee Sing endeavoured to dispossess them by force; that on their application to the Judge, he proceeded to the spot and ordered the attachment of the estate through the Collector; that the Judge, after a summary enquiry into the rights of the parties, gave the defendant possession of the estate on his furnishing security, leaving them to institute a regular suit for the recovery of their rights. They accordingly instituted the present

A case relating to the succession of an estate in the *Jungle Mehals*, wherein it was determined that, agreeably to family usage, the brother of a deceased childless Rajah should take his estate to the exclusion of his widow.

- 1825.** action for that purpose, laying their suit at 7,214 rupees, 4 anas, being three years produce of the estate. They pleaded that their title was valid under the family custom, and that the deed of gift did not create a new right, but merely confirmed the family custom; and that regulation 10, 1800, provided for upholding the customs of succession in the Jungle estates.
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dows of
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wur Sing, v.
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Pertee Sing.** The defendant pleaded, that according to the family custom, on the death of a childless Raja, his eldest surviving brother would take his estate undivided, to the exclusion of his widows, who are entitled only to maintenance from the estate; that the same custom, obtained in the estates of pergunnas Palamow, Pachete, and the other Jungle estates; and brought forward instances in his family wherein the custom had been followed. He denied that the estate had ever gone by right of succession to a female, the object of the custom being to preserve the estate in the family. He stated that the Rauees of Raja Futteh Sing and Raja Parusnath took the estates they respectively held in the following manner: Raja Futteh, knowing that on his death the whole of his estate would go by inheritance to his nearest, to the exclusion of his other heirs, made an arrangement for their mutual support; he separated from the family estate a six ana share, which he gave to his brother Koonwur Mendi Sing, and a four ana share, which he gave to his uncle Koonwur Bisheu Sing; and had these shares registered in the Collector's office in the name of those persons, retaining in his own possession the remaining six ana share till his death, when, in consequence of the special agreement, his widow took the said reserved share. When Raja Parusnath took the estate of his father, Koonwur Pertee Sing his brother, received an assignment of land for his support, and by accepting the said assignment, virtually and actually resigned his claim to the succession, so that on the death of Raja Parusnath his widow, as his next heir, succeeded to his estate. He denied that he, as stated by the plaintiffs, had received an assignment of land for his support on the accession of his brother, or that his brother executed a deed in favour of the plaintiffs. He stated that Raja Mohun Sing, being much dissatisfied with the conduct of Zorawur Sing, his elder son, disinherited him, and made over the whole of his estate by a deed of gift regularly executed to h.m (defendant) his younger son, and put him in possession thereof during his own lifetime, and that he managed it for the last ten years of his father's life; that on his death, his widow (the mother of the defendant and his brother), previous to sacrificing herself with his body, entreated him (defendant) for the honour of the family, to allow the zemindaree to be registered in the name of his elder brother; and that he, complying with her dying request, installed Zorawur Sing as Raja, retaining however the management of the estate in his own hands; that in the month of Assin 1219 B. S., (August, September, 1812) Raja Zorawur Sing, in remembrance of former benefits, proclaimed h.m as his successor, and put a turban on his head in the presence of many of the neighbouring zemindars, and requested him to provide for his widows after his death; and that on his death, Rauee Surroop Koomari, his elder widow, having intimated

her intention to burn with her husband's corpse, installed him as Raja in the presence of the persons who had assembled on the occasion. He denied that the plaintiffs had ever possession of the estate, and asserted that he had the uncontrolled management thereof from the day on which his father gave him possession till it was attached by order of the Judge.

The plaintiffs filed an original *hibehnama*, or deed of gift, executed in their favour by Raja Zorawur Sing, granting to them the whole of his estate, and directing them to supply the defendant with food and raiment, dated 9th *Jeyt* 1220, B. S. (21st of May 1813); a *purnawa* issued by the Judge of the Zillah Court of the *Jungle mehals*, dated 2nd of August 1818 (19th *Sawun* 1220 B. S.), to Raja Zorawur Sing, acknowledging the receipt of a petition from him, reporting his having granted his estate to the plaintiffs, but informing him that he should have reported this circumstance to the Collector and not to the Civil Court; and several other documents. The defendant filed copies of the depositions of several of the zemindars of the Jungle estates, taken by the Judge on a former occasion, in order to prove the custom of his family. Several witnesses were named by both parties and examined. After the whole of the pleadings, documents, and depositions of the witnesses had been read, the Senior Judge (J. R. Elphinstone), put a question to the pundit of his Court, with directions to give an answer according to the *shaster* as current in the Western Provinces, as the family of the parties were Rajpoots, who had formerly come from the Western Provinces, and performed their religious ceremonies according to the *shaster* current in those provinces. The answer was in the following terms: "If a person dying leave three sons, and if his hereditary estate have been taken, according to the family custom, by his eldest son, the said eldest son cannot, during his lifetime, grant the said estate to his second and third wives, to the exclusion of his elder Ranee and two brothers, who are still alive. If he have made such a gift, it is not valid, and the right of inheritance in the said estate is vested on the death of the donor in his two brothers."

After perusing the whole of the proceedings, the Senior Judge was of opinion that the plaintiffs had failed to prove that the family custom provided for the estate of a childless Raja going to his widows, to the exclusion of his brothers; or that their husband did really execute a deed of gift in their favour; observing, at the same time, that if the family custom were really as stated by them, such deed would be superfluous and that it was highly improbable that he should have granted his estate to his second and third widows, while his senior widow was alive, without giving any reason for omitting her name; and that the deed was invalid under the *nyuvushta* of the law officer. He observed that Raja Zorawur Sing had stated, in his deposition, taken on a former occasion by the Judge of the Zillah Court (a copy of which was filed by the defendant), that on the death of a childless Raja, his brother would, with the consent of his Ranee, take the estate: and that it was proved by the evidence, that the elder Ranee of Raja Zorawur Sing, before she burned with the body of her husband,

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did consent to the defendant taking the estate. He considered the right of the defendant to the estate clearly established, and passed a decision in his favour, dismissing the claim of the plaintiffs; and ordered that the defendant should supply them with food and raiment.

The plaintiffs being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut *in forma pauperis*. The appeal being admitted, they urged the same pleas as they had brought forward in the Provincial Court. In order to account for the omission in the deed of gift of the name of Ranee Surroop Koomari, they stated, that having formed an intention of not surviving her husband, she communicated her intention to him, so that it was unnecessary for him to provide for her, and that he might have feared that if he secured to her any property, she might have been tempted to forego her resolution. They pleaded that the deposition of their husband could not be construed into an admission of the respondent's right to the estate, and that even if Ranee Surroop Koomari did actually give her consent to his accession to the estate (which consent they asserted had never been given), to make his claim valid, their consent also would be necessary; on the plea that the term "consent of the Ranee" presumed that there was but one. They also objected to the *vyuvustha*, as having been given according to the law current in Hindooostan, whereas the family had resided in Bengal for upwards of two centuries, and had conformed to the *shaster* current in Bengal.

The respondent repeated the pleas before urged in support of his claim; and in answer to the new pleas brought forward by the appellants, he stated, that he had obtained the consent of the *paat rance*, or senior widow of his deceased brother, and that her consent was sufficient. He objected to the application of the Bengal *shaster* to this case, pleading that the estate was situate in a part of the country which had formerly been considered part of the Province of Behar, where the Bengal *shaster* was not received.

The case came on before the Second Judge (C. Smith). After perusing the whole of the proceedings, he observed, that he was satisfied with the proof adduced by the appellants in support of the family custom pleaded by them: that only one instance had been adduced in which a brother of the deceased Raja had taken the estate: viz. when on the death of Raja Inder Sing, who left no legitimate son, Tej Sing, an illegitimate son, having taken possession of the estate, was dispossessed, and slain by Jeswunt Sing, the brother of the deceased Raja: and that there was no proof that Jeswunt Sing did not obtain the consent of the Ranees; and even if he did not obtain their consent, this appeal to the sword could not be brought forward as a precedent in favour of the respondents in opposition to the will of the appellants: that on the contrary, two instances had occurred in which the Ranees of a deceased zemindar had obtained possession of their husband's lands under decisions given against the claim of brothers. He was of opinion, that there was ample proof that the appellants were entitled to the estate under the family custom, and that the deed of gift produced by them was executed in their favour by their husband: that the pre-existence of the right did not invalidate

the deed, nor could the validity thereof be affected by the *tyavrustha* of the law officer of the Provincial Court, inasmuch as regulation 10, 1800, provided for the decision of cases of disputed succession in the *Jungle* estates, according to the custom of the families, and not by the general rule of the Hindoo law: that it was proved by certain proceedings held by the Court of Sudder Dewanny Adawlut in A. D. 1813, that a misunderstanding existed between Raja Zorawur Sing and the respondent his brother, the latter attempting (though without success) to prove the former to be in a state of mental derangement, so that little probability existed of his having any intention that the respondent should take his estate after his death: that it was clearly proved by the evidence of the witnesses named by the appellants, that Ranee Suroop Koomari, before she burned with her husband's corpse, marked the appellants on the forehead with the *teeka*, and though one witness, named by both parties, deposed that she also marked the respondent, this did not affect the case; it was not in her power to grant the estate away from the appellants, contrary to the wishes of her husband; nor could both parties participate therein, as it was an undivided estate, not subject to partition. He considered the omission of the name of the elder widow of Zorawur Sing satisfactorily accounted for by the supposition that her husband might have feared that she would retract her intention of burning with his body, if she were provided for at his death. On consideration of these circumstances, he recorded his opinion, that the decision of the Provincial Court should be reversed, and that the appellants should be put in possession of the estate, and that they should provide for the maintenance of the respondent; and ordered that the suit should lie over for the opinion of another Judge.

The Officiating Chief Judge (J. H. Harrington), who next took up the case, was of opinion on perusal of the documents and evidence, that the zemindaree in question was one of those which had always been held by the chief male heir, the remaining heirs receiving only food and raiment, and that it never had been taken by a Ranee or other female. He did not consider the evidence sufficient to authenticate the execution of the deed, and observed, that the following facts afforded strong grounds for presuming that the deed was not really executed by him: the established fact of the Raja having been, for some time before his death, affected with palsy and incapable of executing a deed: the estate having continued in the Collector's books in the Raja's name till the day of his death; and the omission of the name of the elder Ranee, without any cause being assigned for such omission. He therefore recorded his opinion that the decision of the Provincial Court in favour of the respondent, should be confirmed. As this opinion did not agree with that of the Second Judge, he ordered that the case should go before a Third Judge.

The Fifth Judge (W. B. Martin) was of opinion, that it was clearly proved that, according to the custom of the family of the zemindars of pergunnah Jurria, the estate had always gone to the chief male heir, to the exclusion of the other members of the family, and that the family custom should be upheld, under the provisions

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of regulation 10, 1800. He therefore, in concurrence with the opinion of the Officiating Chief Judge, passed a final decision confirming the decision of the Provincial Court, and dismissing the appeal with costs, payable by the appellants, in case it should appear subsequently that they were, or should become, possessed of property.

1825.

May 3d.

**MUSSUMMAUT MAHRANEE (Widow) and CHOWLAI CHOWDRY, (Son of Gooroo PERSHAD CHOWDRY, alias Nuttoo Chowdry, deceased), Appellants,
versus
BENEET PERSHAD RAI (Son of Sheo PERSHAD CHOWDRY), Respondent.**

Claim to the moiety of an estate in Zillah Bhaugulpoor disallowed, on proof that the estate had always devolved on the eldest son or nearest heir of the deceased proprietor, his other heirs being entitled merely to food and raiment from the estate.

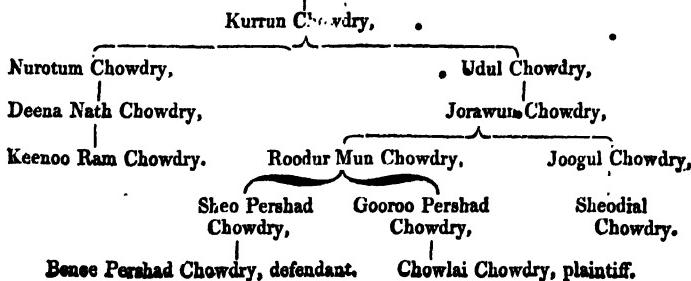
A SUIT was instituted on the 24th of May 1804, in the Zillah Court of Bhaugulpoor, by the appellants, the widow and son of Gooroo Pershad Chowdry, against Beneet Pershad Rai, son of Sheo Pershad Chowdry and Roop Narain, *serberokar*, appointed to the charge of the estate by the Court of Wards, to obtain possession of a moiety of talook Soondbehari, talook Suleempur, &c. situated in Tappa Dakhil Koorij, Zillah Bhaugulpoor, the estate of Roodermun Chowdry, the father of Sheo Pershad and Gooroo Pershad. The claim was resisted by the defendants on the plea that the estate had invariably descended entire to the eldest son, and that Sheodial, son of Joogul Chowdry, brother of Roodermun, having formerly sued Sheo Pershad for a moiety of the estate, a decree was passed by the Court of Sudder Dewanny Adawlut, on the 21st of February 1793, awarding the entire estate to Sheo Pershad, and directing him to supply his brother Gooroo Pershad, and the claimant Sheodial, with food and raiment. The Acting Zillah Judge (J. W. Laing) considered the cognizance of the suit barred by the said decree, and accordingly dismissed the claim on the 10th of June 1807. This decision was confirmed on the 16th of January 1809, by the Provincial Court of Moorshedabad (present J. Pattle, Senior Judge, and E. L'Estrange, Third Judge). An appeal having been preferred from these decisions to the Sudder Dewanny Adawlut, that Court did not think the decree passed by the Court on the 21st of February 1793, conclusive against the claim of the plaintiffs, as neither they nor Gooroo Pershad were parties in the suit, and were not heard in support of their claims. An order was therefore passed on the 13th of December 1813, (present H. Colebrooke, and J. Fombelle) reversing the decisions of the Zillah and Provincial Courts, and directing the Provincial Court of Moorshedabad (the amount being such as to render the suit cognizable by that Court, under regulation 13, 1808) to receive the suit, and to investigate the claim of the plaintiffs.

The plaintiffs accordingly instituted the present action on the

28th of February 1814, to recover a moiety of the said estate from Benee Pershad Rai, who by the death of his father, and the removal of the *se. berakar*, had possession of the whole thereof, laying their action at 7,000 rupees, the annual produce of the moiety claimed. They stated that on the death of Roodermun Chowdry, his sons Sheo Pershad and Gooroo Pershad had joint possession of the estate; the name of Sheo Pershad, the elder brother, being registered in the Collector's records according to custom (which fact they pleaded did not affect their claim), and messed together till the death of the latter in 1209, B. S., when the plaintiffs continued to mess with Sheo Pershad; that Sheo Pershad becoming insane, the estate was attached by the Court of Wards and put under charge of a *serberakur*, who managed it during the life-time of Sheo Pershad, and that on the death of Sheo Pershad, when it was delivered over to Benee Pershad, his son, that they continued to reside with Benee Pershad, till the month of *Cheyt* 1212, F. S. when he turned them out of the family dwelling-house, and deprived them of their share of the profits of the estate. They therefore instituted the present action to obtain possession of a moiety of the estate in right of Gooroo Pershad.

The defendant stated that the estate in question was one of those which, not being divisible among the heirs, devolves entire on the eldest son or next heir of the deceased: that it was acquired by his ancestor Mud Soodun Chowdry (a), on whose death it devolved on his only son Kurrun Chowdry; after whom it was successively taken by Nurotum, Deena Nath and Keenoo Ram Chowdry, the younger branches receiving only food and raiment; that on the death of Keenoo Ram Chowdry without issue, Udui Chowdry and Jorawun Chowdry having both demised, Roodur Mun, the eldest son of the latter, took the entire estate, Joogul Chowdry receiving maintenance therefrom, in conformity with the family custom; that on the death of Roodur Mun, Sheo Pershad, his eldest son, took the entire estate, and enjoyed it during his life, and that as he was also dead, he, the defendant, was entitled in like manner to take it, the other branches of the family being entitled only to claim maintenance from him: that Sheodial Chowdry, the son of Joogul Chowdry, having formerly sued Sheo Pershad in the Zillah Court for a moiety of the estate, obtained a decree on the 10th of November 1791, awarding to him the moiety claimed; and declaring that the other moiety should be equally divided

(a) MUD SOODUN CHOWDRY,



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between Sheo Pershad and Gooroo Pershad, the sons of Roodur Mun, but that this decree was reversed by the Sudder Dewanny Adawlut on the 21st of February 1793, when that Court decided that Sheo Pershad, as chief of the family, should take the entire estate, and that he should, according to the family custom, supply Gooroo Pershad and Sheodial with food and raiment; that Gooroo Pershad had received from Sheo Pershad the monthly sum of 10 rupees for his support, under the said decree; and that he had of his own accord separated himself from Sheo Pershad, and removed with his family to another dwelling, in which he lived till the day of his death. He also stated, that previously to the birth of Sheodial, Joogul Chowdry having no children, adopted Gooroo Pershad, with the consent of his brother Roodur Mun, so that Gooroo Pershad had no claim to share in the estate of Roodur Mun, even if it were divisible, or to receive maintenance as his son; as by the Hindoo law an adopted son becomes to all intents and purposes, the son of his adoptive father, and is excluded from the property of his natural father.

The plaintiffs denied that Gooroo Pershad had been adopted by Joogul Chowdry, or that he had ever received maintenance from Sheo Pershad, and pleaded that as neither they nor Gooroo Pershad had had an opportunity of urging their claims, the decision of the Sudder Dewanny Adawlut, before alluded to, was no bar to the cognizance of the suit.

The Provincial Court, on perusal of the decree of the Sudder Dewanny Adawlut of the 21st of February 1793, observed, that it was laid down in that decree that Sheo Pershad, as the principal heir, was, under the family custom, entitled to the whole estate, and that the other members of the family were entitled only to receive maintenance; and that the point at issue in this case being precisely the same, the reinvestigation of the claim was in direct opposition to the provisions of section 16, regulation 3, 1793. The Court, therefore, considering the said decree conclusive in favour of the defendant, dismissed the claim of the plaintiffs on the 18th of November 1816, leaving them the option of suing the defendant, if they thought proper, for maintenance under the above decree.

The plaintiffs being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut. The pleas urged by the parties in support of their respective claims were similar to those urged in the Provincial Court. The Court, after perusing the proceedings of the Provincial Court, and the pleadings filed before them, observed that the Provincial Court had not investigated the case, as required by the orders of the Court of the 16th of January 1809. They therefore directed the Provincial Court to receive the documents which the parties might wish to file, and to examine any witnesses they might produce in support of their respective claims, and to transmit their proceedings when completed to the Court. Several witnesses having been examined under the above order, the Provincial Court transmitted their depositions, together with the documents filed by the parties, to the Sudder Dewanny Adawlut. The appellants filed copies of two decrees of the Sudder Dewanny Adawlut, one dated the 14th of

February 1799, in the case of Duttnaraen Sing, appellant, versus 1825.
 Ajeet Sing and others, respondents, in which case the Sudder Dewanny Adawlut decreed the partition among the heirs of an estate situated in Zillah Bhaugulpoor, which the appellant declared had always gone to the elder branch to the exclusion of the other heirs, who were stated only to be entitled to receive maintenance therefrom (*vide* vol. I, page 20) the other dated 28th of July 1813, in the case of Sham Singh, appellant, versus Musummaut Umraotee, on the part of Kalee Sur Sing, a minor, respondent, on which a judgment was passed in favour of the appellant for the moiety of an estate in Bhaugulpoor, which the respondent stated had been given by the grandfather of the parties to his eldest, to the exclusion of his younger son (*vide* vol. II, page 74.) The respondent filed several receipts executed by Gooroo Pershad, in acknowledgment of his having received from Sheo Pershad sums of money at different times in lieu of food and raiment.

The case was first taken up by the Fifth Judge (W. B. Martin). He observed, that the talooks in question were acknowledged by both parties to be the estate of Rooder Mun Chowdry, the deceased ancestor. He did not consider the proof adduced by the respondent sufficient to establish the fact of the estate being one of those which go to the eldest son (or nearest heir) to the exclusion of the other heirs, nor did he consider the fact of Sheo Pershad's name being entered in the Collector's books, without any mention being made of Gooroo Pershad, as at all affecting the claim. He therefore recorded his opinion that the decision of the Provincial Court of Moorschedabad of the 18th of November 1816, should be reversed, and that the estate should be divided between the parties in equal portions.

The Second Judge (C. Smith), did not concur in this opinion. He observed, that there was no analogy between this case and a case decided by him in concurrence with the opinion of the Fifth Judge, on the 2nd of April 1825, in which Benee Pershad Rai was appellant and Musummaut Mahranee and Chowlai Chowdry were respondents; the lands which were the cause of action in the latter case not being hereditary, but purchased by Rooder Mun, and consequently not affected by the decision of the Sudder Dewanny Adawlut of the 21st of February 1793; whereas the estate, contested in the present action, was an estrel and hereditary. He was of opinion that the decrees of the Zillah and Provincial Courts passed in the suit formerly instituted, and which were reversed by the Court's order of the 13th of December 1813, were correct; as the decree of the Sudder Dewanny Adawlut of the 21st of February 1793, which formed the ground of those decrees, had awarded the entire estate to Sheo Pershad, on proof of the family custom pleaded by the respondent; that, even with reference to regulation 11, 1793, the claim of the heirs of Gooroo Pershad was untenable, as it was enacted by section 2, of that regulation, that the estates of all zemindars dying after the 1st of July 1794 (20th Assar 1201 B. S.), should be divided among their heirs; that it was clearly proved that Sheo Pershad had possession of the entire estate under the above decree of the

1825.

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Sudder Dewanny Adawlut previous to the date fixed for the operation of that regulation, and held it till his death in 1215 F. S., when the respondent, as his heir, was entitled to the estate; neither Gooroo Pershad, nor his heirs, who were not the heirs of Sheo Pershad, having any claim thereto, though had Sheo Pershad left more than one son, the sons might, under the regulation quoted, have had a claim. He therefore recorded it as his opinion that the decision of the Provincial Court of the 18th of December 1816, should be confirmed, and the claim of the appellants dismissed.

The case was next taken up by the Officiating Judge (H. Shakespear). He was of opinion that the decision of the Court of the 3d of February 1793, (corresponding with the 24th *Magh* 1199 B. S.) barred the cognizance of the claim of the heirs of Gooroo Pershad, as the right of Gooroo Pershad appeared to have been investigated, as well as that of Sheo Dyal, and that as Gooroo Pershad survived the decision upwards of eight years, he having died in 1209 B. S., without having brought forward any claim to the estate, and had received maintenance from Sheo Pershad, there was every reason to believe that he acquiesced in the justice thereof. For this and other reasons detailed in his *roobukaree*, he was of opinion that the appellant's claim to the estate was maintainable. He, therefore, in concurrence with the opinion of the Second Judge, passed a final judgment, confirming the decree passed by the Provincial Court, on the 18th of November 1816, and dismissing the claim of the appellants with costs.

**JUG MOHUN MOKERJEE and GOPEE MOHUN
MOKERJEE, Appellants,**

versus

**PUNCHANUND CHATTERJEE and MUSSUMMAUT
SUBHAMA DIBEA (Widow of ESHUR CHAND
CHATTERJEE, deceased), Respondents.**

1825.

June 27th.

THIS suit was instituted in the Zillah Court of Hooghly on the 20th of September 1815, by the appellants, to recover from Punchanund Chatterjee and Eshur Chand Chatterjee, possession of 35 beegas, 40 biswas of Birmooter land, situate in mouzas of Dadpoor, Kumalpoor and Bujias, pergunnah Salempoor, and mouza Kookuspoor in pergunnah Hater Kandeh, and a moiety of Puttee Shab Ram, an assessed talook; laying their suit at 773 rupees.

The following is a sketch of the family of the parties:

KOOSUL CHAND CHATTERJEE,
left heirs, a widow, Manick Thakorayn
(who survived her sons),
and two sons,

The estate of a Hindoo awarded to the sons of his daughter, in preference to the grandsons by lineal descent in the male line of his full brother.

Tara Chand Chatterjee,
left a widow, Mussummaut Shushee Mokee,
(who survived her daughter)
and a daughter,
|
Mussummaut Goluk Munee,
left two sons,

Nemai Chand Chatterjee, left heir,
one son,
Boee Dhur Chatterjee,
left two sons,

Jugmohun Mokerjee,
Gopee Mohun,
plaintiff.
Mokerjee,
plaintiff.

Punchanund Chatterjee,
defendant.
Eshurchand Chatterjee,
defendant.

The plaintiffs stated that Koosul Chand Chatterjee, the great-grandfather of the parties, left to his two sons, Tara Chand and Nemai Chand, his property, consisting of 93 beegas of Birmooter land in the villages aforesaid, and Puttee Shab Rampoor, and that the brothers held the property in common: that on their deaths in 1169 and 1177 B. S., the said property devolved in equal shares on Golukmunee, their mother, the daughter of the former, and Boee Dhur, the son of the latter: that their mother dying in 1197 B. S. left them minors, on which Boee Dhur took charge of the whole property: that the defendants, his sons, having taken it on their father's death, refused to admit them to participate therein: they therefore, having come of age, instituted this suit to recover, in right of inheritance from Tara Chand, possession of a moiety of Puttee Shab Rampoor, and 35 beegas, 40 biswas of *lakhiraj* land, being the moiety of the *lakhiraj* land of Koosul Chand, after deducting 11 beegas, 6 biswas, which Boee Dhur had given up to their maternal grandmother for her support, and to which they succeeded on her death.

The defendants stated, that the property in question was not the estate of Koosul Chand, but the *stridhun* of Mussummaut Manick Thakorayn, his wife: and that she, on the death of her two sons,

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and others.

gave the whole of the said property to Boee Dhur, her grandson, from whom it came by inheritance to them. They denied the right of the plaintiff to share in the said *stridhun*, as their right thereto was barred by the fact of their maternal grandfather having died during the lifetime of his mother. They also stated, that disputes having arisen between Manick Thakorayn and Mussummaut Shushee Mookee, the widow of Tara Chand, and maternal grandmother of the plaintiffs, the latter left the family dwelling, and lived in a separate house with her daughter: but that Boee Dhur, without the knowledge of the Thakorayn, gave to her 11 beegas 6 biswas of land for her support; and that she executed a deed relinquishing all claim to the rest of the property, to which deed the plaintiff, Jugmohun, put his signature as an attesting witness.

After examining the witnesses of the parties, and considering their evidence and the documents filed, the Zillah Judge was of opinion, that it was clearly and satisfactorily proved, that Rutunisur Mujmoodar, having given his daughter Manick Thakorayn in marriage to Koosul Chand Chatterjee, a *Koolin* bramin, gave him the contested property for his support, and that after his death, his two sons, Tara Chand and Nemai Chand, the grandfather of the parties, had possession thereof: that after the death of these persons also, Boee Dhur, the son of Nemai Chand, took possession of the whole of the property, and gave 11 beegas 6 biswas of land, and some money to Shushee Mookee and Goluk Munee, the widow and daughter of Tara Chand, for their support; promising to deliver up to the plaintiffs, on their coming of age, the share of the property which had belonged to Tara Chand, their mother's father. He was of opinion, that the defendants had totally failed to prove that the land in question had been received by Manick Thakorayn as *stridhun*, as their witnesses were persons of no respectability, and, moreover, gave merely hearsay evidence. He rejected the *farigkhuttee* produced by the defendants, as having been executed by Shushee Mookee, as unproved and improbable; observing, that it was improbable that if Shushee Mookee had any right to the said property, she should have resigned it to the father of the defendants, thereby depriving her daughter and her daughter's sons thereof: or if she had no right thereto, that Boee Dhur would have thought it necessary to have taken such a deed from her. For these reasons he passed a decision in favour of the plaintiffs, on the 26th of March 1818, awarding to them possession of the property claimed by them. The costs were charged to the defendants.

The defendants appealed to the Provincial Court of Calcutta. Eshur Chand demising, no heir appeared to carry on the appeal on his behalf. That Court having consulted their pundit, received the following *ayuvustha*: "If Rutunisur gave his daughter, Manick Thakorayn, in marriage to Koosul Chand, a *Koolin* bramin, and if the said Rutunisur, his wife, and son, gave land to the said married daughter: and two sons, Tara Chand and Nemai Chand, were born to Koosul Chand by the said daughter, and if these sons died, leaving heirs Boee Dhur, son of Nemai Chand, and Goluk Munee, the daughter of Tara Chand: and these two persons

also died leaving heirs, Punchanund and Eshur Chand, sons of Boee Dhur; and Jug Mohun and Gopee Mohun, sons of Goluk Munee; and if Koosul Chand died before his wife Manick Thakorayn; then will the tilooks and property of Manick Thakorayn, given to her by her father, go to the appellants, the sons of Boee Dhur. The respondents, the grandsons by a daughter of Tara Chand will take no share. This *vyuvustha* is according to the Chatterjee ^{1825.} Jugmohan Mokerjee and another, & Punchanund. Chatterjee and others.

The Court being of opinion that there was no proof in the proceedings of the Zillah Court, that Koosul'Chand acquired the property in question, but that the statement of the appellants was proved to be correct, passed a decision on the 14th of April 1821, under the *vyuvustha* of their pundit; reversing the decision of the Zillah Judge, and dismissing the claim of the respondents with costs.

The respondents (original plaintiffs) having petitioned the Court of Sudder Dewanny Adawlut for a special appeal, the Court under all the circumstances of the case, thought fit to admit the appeal. The respondents did not appear to defend the appeal.

After perusing the whole of the proceedings, the Second Judge (C. Smith) was of opinion, with the Zillah Judge, that the property in question was the estate of Koosul Chand Chatterjee, a *Koolin* bramin, and not the *stridhun* of Manick Thakorayn, his wife. He therefore put a question to the Hindoo law officers of the Court, to which they gave the following answers: "If Koosul Chand died leaving as heirs two sons, Tara Chand and Nemai Chand; and Nemai Chand died leaving one son, Boee Dhur, who dying left two sons, Punchanund and Eshur Chand; and if, in like manner also, Tara Chand dying left his widow, Shushee Mookee, and a daughter, Goluk Munee, and Shushee Mookee dying left two grandsons, viz. Jug Mohun Mokerjee and Gopee Mohun Mokerjee, the sons of Goluk Munee, then the said Jug Mohun and Gopee Mohun, the grandsons by a daughter of Tara Chand, are the heirs of the half of the property of Koosul Chand, of which Tara Chand was heir; and while such grandsons of Tara Chand are alive, the sons of the son of his brother are not heirs to his property." The Second Judge, according to this *vyuvustha*, recorded it as his opinion, that the appellants were entitled to possession of the moiety of the property of Koosul Chand, as the grandsons of Tara Chand, and the Officiating Judge (C. T. Sealy), concurring in the opinion, passed a final judgment on the 27th of June 1825, reversing the decision of the Provincial Court of Calcutta, and confirming that of the Zillah Judge of Hooghly, which awarded to the appellants the property claimed by them.

The costs were charged to the respondents.

1825.
June 30th.

NUNDRAM and others, (Heirs of RAM SUNHYE PANDE),
Appellants,
versus
KASHEE PANDE and others, Respondents.

Claim to share in *Birt Mahabrahminee* dismissed; a review of judgment admitted on account of a suspicion that the Pundit, on whose *ayurwatha* the special appeal was decided, had taken a bribe to induce him to give a favourable answer. But it appearing that his exposition of the law was correct, the judgment was confirmed.

THIS suit was instituted by Ram Sunhye Pande, in the Zillah Court of Behar, on the 5th of August 1812, *in formā pauperis*, against Kashee Pande, Jugunnath Pande and Sungum Pande, to prove his right to share in a certain *birt*, called *Birt Mahabrahminee*, consisting of fees receivable by the defendants and himself for the performance of certain religious ceremonies in certain villages of zillah Behar; and to recover from them the arrears of his share. The suit was laid at 4,735 rupees.

This *birt* consisted of the fees received by a certain description of brahmins, called *Mahabrahmins*, who officiate at the ceremonies performed on the eleventh day after the death of a Hindoo. The plaintiff stated, that the right of officiating as *Mahabrahmins* in the villages mentioned in his plaint, belonged to Cheytun Pande, the father of Kashee Pande and Sungum Pande, and Pullut Pande; and that the fees arising from that duty were divided in the proportion of eight anas to Pullut Pande, and eight anas to Cheytun Pande; that Pullut Pande, having no son, adopted him (the plaintiff), the second son of Byja Tewaree his brother-in-law, and in 1185 F. S. and in 1195 F. S. made over to him, by a deed of gift, the whole of his property, real and personal; that he had possession of the share of the *birt* which belonged to his adoptive father, till *Magh* 1209 F. S., when the defendants, who had succeeded their father, dispossessed him; that he instituted a suit against them in the Zillah Court, which was dismissed by the Register on the 13th of November 1809; but that the Judge, reversing the decision of the Register, nonsuited him on account of some informality, thus leaving him the option of instituting a fresh action; that as, therefore, Pullut Pande had died in 1216 F. S., and the defendants still retained possession of the whole *birt*, and excluded him from participating in the profits thereof, he instituted this suit to prove his right to participate in the profits, as an equal sharer with the defendants; to compel them to admit him to a participation, and to recover the amount of fees of which he had been unjustly deprived.

The defendants denied the adoption of the plaintiff by Pullut Pande, and the fact of his ever having participated in the *birt*. They pleaded, that the adoption, if made, could not hold good in the Hindoo law, as the plaintiff, being the only son of his father Byja Tewaree, was not capable of being adopted, and that Pullut Pande had adopted Sungum Pande, one of the defendants. They also denied the execution of the deed of gift pleaded by the plaintiff, and alleged that, according to the Hindoo law, the *birt*, being joint and undivided, was not capable of alienation by gift or otherwise.

The Officiating Zillah Judge, after perusing all the pleadings and documents filed by the parties, was of opinion, that it was proved that Pullut Pande and Cheytun Pande were own brothers,

and had possession in equal proportions of the *birt* in question, left to them by their father: that Pullut Pande adopted the plaintiff in 1185 F. S., and that the latter was the second son of Byja Tewaree, his brother-in-law: and that in 1195, Pullut Pande made over to the plaintiff, by a deed of gift, the whole of his property, and that the plaintiff, in virtue of this adoption and gift, was entitled to one-half of the said *birt*. He accordingly passed a decision in his favour on the 12th of November 1816. The costs were charged to the defendants. 1825.
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Kashee Pande, Juggunnath Pande, and the heirs of Sungum Pande, who had demised, appealed from this decision to the Provincial Court of Patna. They used the same arguments in support of their claim to the whole *birt* as they had urged in the Zillah Court.

The Provincial Court of Appeal did not concur with the Officiating Zillah Judge in his view of the case. They were of opinion, that it was proved that the *birt* was undivided, and that the gift thereof was, for that reason, invalid. With regard to the adoption, they thought the evidence adduced by the respondent insufficient to establish the fact of the father of the respondents having had another son, in opposition to the evidence of Run Misser, the maternal uncle of the respondent, who deposed that he was the only son of his father Byja Tewaree. They were also of opinion, that the respective shares of Cheytun Pande, the father of the original defendants, and Pullut Pande, were not clearly ascertained, and that the respondent had failed to prove that he had possession, or had participated in the profits of the *birt* till Poos 1209 F. S. They therefore reversed the decision of the Zillah Court, dismissed the claim of the defendant, and directed that whatever portion of the profits had been received by the respondent on execution of the Zillah decree should be restored to the appellants. The costs were charged to the respondent.

Ram Sunhye Pande, being dissatisfied with this decision, presented a petition to the Court of Sudder Dewanny Adawlut, praying the admission of a special appeal therefrom. The Court (present C. Smith and S. T. Goad, Second and Third Judges) being of opinion that it was proved, as set forth in the Zillah decree, that Pullut Pande did adopt Ram Sunhye Pande, that the latter was not the only son of his father Byja Tewaree, and that Pullut Pande executed the deed of gift for the whole of his property in favour of his adopted son, admitted a special appeal, and allowed him to plead as a pauper; but as he died at this stage of the proceeding, the appeal was carried on by the present appellants, his sons, who were also admitted to plead as paupers.

Previously to coming to a final decision, the Court (present W. Leycester, Chief Judge, and W. Dorish, Fourth Judge) put the following questions to their pundits, on the 14th of May 1823:

1. According to the Hindoo law, as current in Behar, is the adoption of a person, the only son of his father, valid or not?
2. Is the gift of joint undivided property, whether it be real or personal, valid as far as relates to the share of the donor?
3. Is *Birt Mahabrahminee* alienable or not? and if it be enjoyed by several brahmins conjointly, has any one of them a right to

1825. alienate his share by gift or sale, it not being divided off from the rest of the *birt*?

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The following answers were given in under the signatures of Sobha Shastree and Ram Tunnoo Vidia Bageesh, the pundits of the Court:

Answer to the first question; according to the Hindoo law, as current in Behar, the adoption of the only son of his father is invalid, for this reason, that it is forbidden by the *shasters* to give or receive an only son; no adoption is valid without giving and accepting.

Authority: Text of *Vusishtha* cited in the *Duttuca Mimansa*, *Duttuca Chundrica*, &c. "Let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors; nor let a woman give or accept a son, unless with the assent of her lord."

Answer to the second question; the gift of joint property, whether it be real or personal, is invalid as far as regards the share of the donor, for without *vibhaga* (or partition) sale or gift cannot take place.

Authority: *Mitakshura*. "Partition is the act of ascertaining several individual rights."

Answer to the third question; if among *Mahabrahmins* several persons are entitled to share in the *Birt Mahabrahminee*, the said *birt* cannot be alienated; and if the said *birt* be held in joint tenancy by several *Mahabrahmins*, one of these cannot alienate his share by gift or sale, unless the *birt* be first divided. They are called *Mahabrahmins*, who, on the 11th day from the death of a person, eat the food prepared, and receive the gifts made, in the name of the deceased. This eating and receiving gifts is their *birt*: that *birt* therefore cannot be alienated, whether joint or divided.

Authorities: 1. *Deva Yujnika*, cited in the *Nirnya Sindhoo*. "Having assembled eleven brahmins, having invoked the manes of deceased ancestors, let him present to the brahmin occupying the foremost seat, the couch, &c. belonging to the deceased."

2. *Vrihaspati* in the *Nirnya Sindhoo*. "Having sprinkled them with odoriferous perfumes, let him present to the sacrificer his father's wearing apparel, his ornaments, his sleeping couch, &c."

After considering the whole of the proceedings of the Zillah and Provincial Courts, and the *vyavustha* of the pundits, the Judges before mentioned, seeing no reason to alter the decision of the Provincial Court, passed a judgment on the 30th of June 1823, confirming the said decision, and dismissing the appeal with costs. (a)

On the 23d of August 1823, the appellants petitioned the Court to admit a review from the judgment passed by the Chief and Fourth Judges on the 30th of June preceding, on the plea that Sobha Shastree, one of the pundits of the Court, had taken a bribe from the opposite party, and that his *vyavustha* was contrary to the Hindoo law.

As there existed a strong suspicion, not amounting to full proof, that Sobha Shastree had taken bribes in certain cases; as the said pundit had absconded, and had been deemed un-

(a) For a report of this decision see vol. 3, page 232.

worthy to hold the office of pundit, and dismissed by the Governor General in Council, on the recommendation of the Court, a review was admitted on the 3d of May 1824, by the concurrent opinions of Courtney Smith (Second Judge), W. B. Martin (Fifth Judge), and John Ahmety (Officiating Judge), for the purpose of enquiring whether or not the *vyuvustha* given by Sobha Shastree, on the strength of which the decision of the Provincial Court was confirmed, was correct or not; in opposition to the opinion of John Shakespear (Third Judge), who was of opinion that there was no sufficient ground for admitting a review, inasmuch as the said pundit had given the authorities for his answers, and the sitting Judges had weighed and considered them; and that if a review were admitted merely on the grounds of the suspicion which existed against the pundit, the same reason might be pleaded for admitting a review of judgment in every case in which the decision was founded on a *vyuvustha* of the said pundit. The order of the Second Judge, containing his opinion that a review should be admitted was to the following effect: "The petition for a review of judgment, the former proceedings and documents connected with this case, and the papers relative to the charge of corruption against the pundit Sobha Shastree having been read, a question was put as to the cause which prevented the production, in the Courts below, of the certificate now brought forward for the purpose of proving that Byja Tewaree had two sons; it was answered, that the certificate was not written until after the Zillah decision, and that it was either not written until after the decision of the Provincial Court, or that the Judges of that Court had refused to receive it; that the appellants cannot speak positively as to that question, as their father was then alive and was alone acquainted with all the circumstances of the family; but that mention of the certificate was made in the petition for the admission of a special appeal. Of the two cases cited by the appellants in favour of their claim to having the judgment against them reviewed, the one, decided on the 27th of June 1803, is a Bengal case, whereas the Hindoo law as current in Behar, is that by which the case of the appellants must be governed: the other case, decided on the 31st of January 1816, does not appear to be in point. But a review of judgment in this case appears proper for several reasons; first, because the *vyuvusthas* of the pundits of the city of Patna and of the Zillah Court of Behar favour the claim of the appellants, supposing them to be sound expositions of the law; for, according to them, admitting Ram Sunhye, the father of the appellants, to have been the only son of Byja Tewaree, his adoption by Pullut Pande was not unlawful: secondly, because it appears to me to have been proved in the Zillah Court that Byja Tewaree had two sons, namely, Ram Sunhye and Lal Chund, and it has never yet been asserted that, admitting this to be the fact, the adoption of Ram Sunhye would have been illegal: as to the gift of this species of property termed *Birt Muhabrahminee*, even though joint and undivided, I am of opinion that transfers of it are usual and universal in practice throughout the country; and that if such transactions were pronounced to be illegal by this Court, people

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others.

of this class would suffer very material detriment in the conduct of their affairs. It appears also, from the answer of the adverse party in the Zillah Court, that Pullut Pande sold his share, and that in consequence of the sale, his share was taken by Manik Chund, the purchaser, on whose son, Nursingh, it subsequently devolved, and after his death, it went to his widow Mussummaut Nolka, who is now in possession of it. In consequence of this sale, the claim to the portion of Pullut Pande is untenable; and if a sale is lawful, a gift is so likewise. The objection urged appears to be, that the donee was not of the same *gotra*, or lineage; but the answer to this is, that a person who has been received in adoption is unquestionably a fit person to be the donee of his adoptive father: fourthly, from the evidence of Jugroop and Runglal, delivered in this Court, there is strong ground to believe that Sobha Shastree, in conformity to whose exposition of the law the decree of the Court below was affirmed, received a bribe in this case. The Judges of this Court, indeed, suspecting his integrity in this and other cases, recommended his removal; and he was accordingly removed by order of the Governor General in Council; and although it is possible that the legal opinion delivered by the said pundit may have been correct, notwithstanding his corruption, yet where there is so much suspicion, it would be wrong to dispose of a case finally solely on the ground of such opinion: fifthly, by reason of the adoption of the father of the appellants by Pullut Pande, they are excluded from their own family: if the decision of this Court be confirmed they will be excluded also from the family of Pullut Pande; and thus become rejected outcasts from the domiciles of both: this can never be consistent with the dictates of justice or humanity. In short, I am of opinion, that equity requires a review of judgment in the case of the appellants: after the answer of the respondents shall have been delivered in, the law applicable to the case investigated, and due consideration had of all the bearings of the case, a final decision will be given. As the two Judges by whom the decree against the appellants was passed are not present, it is ordered, that the proceedings be laid before some other Judge, with a view to procure a concurrent voice as to the propriety of reviewing the judgment." Accordingly, on the 20th of March of the same year, the papers of the case were laid before the Third Judge (J. Shakespear), who recorded his opinion in these terms: "I do not approve of the petition for a review of judgment, or of the reasons assigned in the proceeding of the Second Judge for admitting it, for several reasons, first, because Doodee Pande, one of the appellants, has assigned no sufficient reason for not producing the certificate of family until after the decision of this Court: secondly, no weight can be attached to the *vyuvusthas* of the Patna and Behar Courts, from the circumstance of their not having been adduced until after the decision of the suit: thirdly, the decree of the Chief and Fourth Judges was not founded on the *vyuvustha* of the pundit alone, but upon the whole bearings and circumstances of the case: fourthly, in the *vyuvustha* in question, texts are cited. Had the Judges conceived the exposition erroneous they would have rejected it: although strong suspicion does exist that Sobha

Shastree was, in this case, under the influence of corrupt motives, yet there is no proof of the fact; and if such suspicion is permitted to operate as a ground for admitting a review of judgment in this case, it must equally operate to produce the same effect in every cause in which the said pundit has ever furnished a legal exposition. I am therefore of opinion that the petition should be rejected. The proceedings must go before a third Judge." On the 21st of April 1824, the case was submitted to the Fifth Judge (W. B. Martin), who concurred with the Second Judge, assigning the following as his reasons for concurrence : " Although I admit that the answers of the Patna and Behar pundits, now filed along with the petition for a review of judgment, cannot avail the appellants, and that the certificate of the state of the family from the fact of its not having been produced during the former investigation, cannot now, with propriety, be received, still I am of opinion that a review of judgment should be had in consequence of the very strong suspicion which exists of the corruption of the pundit Sobha Shastree, according to whose opinion, apparently, this case was decided; and who, on account of the suspicion attaching to his conduct in this and other instances, has been removed by Government from his office." In conformity to the concurrent opinion of the two Judges abovenamed, an order was recorded on the 28th of April, that as the Third Judge had dissented from the measure of admitting a review, it would be advisable to take the opinion of a fourth Judge on the point. On the 3d of May 1824, Mr. J. Ahmety (the Officiating Judge) recorded his opinion to the following effect: " As it appears that Sobha Shastree, a pundit of this Court, according to whose exposition of the law, apparently, this case was decided, was, subsequently to the petition for a review of judgment being presented, removed from office, in consequence of a suspicion that he had been actuated by corrupt motives in this among other cases, I am of opinion that it is just and proper, the judgment should be reviewed." Under these circumstances agreeably to the opinions of the Second, Fifth and Officiating Judges the review was admitted.

The Second Judge, on the 29th of July 1824, ordered that the three questions put by the Chief and Fourth Judges (on the 14th of May 1823) to Sobha Shastree (who was the pundit whose opinion was generally taken with regard to the law current in the western provinces : Ram Tunno Vidya Bageesh being the pundit consulted on points governed by the *shaster* current in Bengal, and having merely signed the *vyuvustha* as a matter of form) and the following question should be put to Bydianath Misser, the pundit appointed to succeed Sobha Shastree, with orders to give his *vyuvustha* by noon on the 3d of the ensuing month.

4th question. In *Birt Mahabrahminee*, in which the shares of each are fixed by *parehs* or days, is the share of the sharers of each *pareh* considered as the joint property of the whole of the sharers in the *Birt*? Or is it held to be the separate share of the sharers in that individual *pareh*?

Bydianath Misser gave in the following *vyuvustha* on the 3d of August 1824, according to the *Mitakshara*, *Duttuca Mimansa*, *Duttuca Chundrica*, and other tracts current in Behar :

1825.

Nundram and others, v. Kashee Pande and others. Answer to the 1st question; according to the *shaster* current in Behar, the adoption of the only son of his natural father is invalid.

Authorities: 1. *Sounaca*, in the *Duttuca Mimansa* and *Duttuca Chundrica*. "Let not a person, having but one son, give him to another: if he have many sons, he may give one."

2. *Vasistha* in the *Mitakshura*, *Duttuca Mimansa*, and *Duttuca Chundrica*. "Let not a person, having but one son, give him to another: nor can one take such a son: for the said son is intended to keep up the family of his father."

Answer to the 2d question; property being held in joint tenancy by several sharers, whether it be real or personal, no one of the said sharers has authority, without the permission of the co-sharers, to call any part of the said property his share, and to give it away.

Authorities: 1. *Vyusa* in the *Mitakshura*. "In immoveable property, whether divided or undivided, all the sharers share alike among them: one person cannot sell, mortgage, or give it away."

2. *Nareda*, in the *Duttuca Mimansa*. "Property in deposit; an only son; a wife; property held in common between many sons, cannot under any circumstances be alienated."

Answer to the 3d question; *Birt Mahabrahminee* cannot be transferred except to a *Mahabrahmin*, for it belongs to a *Mahabrahmin* alone to eat of the food and presents offered at exequial ceremonies performed on the eleventh day after the death of the ancestor, and the presents bestowed on them on that occasion. *Birt Mahabrahminee* can only be transferred to a *Mahabrahmin*, and to no other.

Authorities: 1. *Vrihaspati* in the *Mitakshura*. "In the exequial ceremonies of a person deceased, let them worship the *Mahabrahmin* with sandal-wood and necklaces of flowers; and give him clothes, ornaments, carpets, &c. on the part of the deceased."

2. *Nareda*. The same as the 2d authority for the 2d answer.

Answer to the 4th question; if *Birt Mahabrahminee* be held in joint tenancy by several sharers, unless it be divided, no one of the sharers is at liberty to alienate that portion thereof which forms his share, without permission of the other sharers; and if several sharers have possession of *Birt Mahabrahminee*, and the *parehs* or divisions into days, are fixed, the interest of the sharers of each *pareh* is distinct and separate, as far as relates to the sharers in the remaining *parehs*; but as far as relates to the interests of the sharers in each individual *pareh*, that individual *pareh* is held to be joint and undivided.

Authority: *Mitakshura*. "Vibhaga, or partition, is the act of ascertaining several individual rights."

After perusing this *vyavvustha*, and the whole of the proceedings, the Second Judge recorded his opinion on the 11th of August 1824, that the decision of the Provincial Court of Patna should be reversed, and that of the Zillah Court of Behar confirmed.

The decree of the Second Judge was to the following effect: "After perusing all the proceedings in this case, it appears to me

to be clearly established, that Pullut Pande, Cheytun Pande (the father of Kashee Pande), and Sungum Pande, were in joint and equal possession of the *Mahabrahminee Birt*; that Pullut Pande being childless adopted Sunhye Pande (the deceased appellant, who was one of the two sons of Byja Tewaree) and put him into possession of his (Pullut Pande's) share of the *birt*; that afterwards, Kashee Pande and his brother Sungum Pande forcibly dispossessed the appellant of such share, which led to his instituting a complaint for the recovery of his right, which was supported by the evidence of Sheodial Pande, Kushoo Misser, Kokhul Tewaree and Sirdha Tewaree, whose depositions are contained in the papers marked Nos. 34, 35, 36 and 37, filed in the Zillah Court of Behar; from the exhibit filed as No. 64, which was a letter written by Pullut Pande to the address of Ram Sunhye Pande, dated the 21st of *Zeeacuda* 1195 F. S., it appears that he had formally adopted the said Ram Sunhye Pande, son of Byja Tewaree, and had made a gift to him of the *birt* and of all his other possessions. The right of the appellants is also established on the following grounds: the decision of the case in which the wife of Pullut Pande was plaintiff, against Deokee Tewaree, dated the 2nd of October 1777, the *purwanna* addressed to Surjoodeen Moohummud Khan, dated the 4th of October of the same year; the *purwanna* dated the 2nd of October of the same year, addressed to Mirza Shumsoodeen, which was issued in conformity to the decree (No. 65); the dismissal of the suit brought by Kashee Pande against Pullut Pande, dated the 21st of May 1790; the nonsuit in the Zillah Court of Behar, dated the 13th of February, 1814, which proceeded on the ground that from the evidence and exhibits adduced by the parties, no doubt existed as to the right of Pullut Pande, the paternal uncle of the defendants, or the validity of the deed of gift executed by him; the plaint filed by Kashee Pande against Pullut Pande (No. 73); the deposition of Ahmad Ali Kazee of Gya (No. 71), dated the 23rd of August 1809, which went to uphold the deed of gift, and was to the effect that the *birt* profits of Gya had always been shared by Pullut Pande and Cheytun Pande, the father of Kashee Pande, who were brothers, that the division of those profits took place in the presence of him (the deponent), and that they remained in possession of their respective shares until Kashee Pande ousted Pullut Pande; and the deposition of Rama Sahoo, bearing date the 13th of November 1809, which proved the fact that Pullut Pande, Kasheenath Pande and Ram Sunhye Pande, united in performing the exequial rites of Gungaram. The depositions of the witnesses now adduced on the part of the defendants (marked Nos. 39, 40, 41 and 42, of the Zillah papers) are wholly at variance with their depositions in a former case (marked Nos. 81, 88, 89, and 92.) They appear to have now come forward with two new falsehoods, which were not even hinted at in their former depositions. The first is, that the deceased Pullut Pande adopted Sungum Pande; and the second is, that one Horil Singh adopted the deceased Ram Sunhye Pande. These allegations are totally unworthy of credit, the defendants have not been able to adduce a tittle of proof that Pullut Pande was not in possession of a share, or that he did not adopt Ram Sunhye Pande.

1825.

Nundram
and others,
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Pande and
others.

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and others,
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others.

It is evident that Ram Sunhye Pande was in possession of the house at Boonead Gunge, left by Pullut Pande, until the date of the institution of this suit, and he would have been in possession of the *birt* also, had not the defendants wrongfully ousted him. Even had the deed of gift not been executed, still the property of Pullut Pande would have devolved, in the ordinary course of inheritance, on his lawfully adopted son Ram Sunhye Pande, the deceased appellant. The relationship of that individual to the defendants is indeed amply proved by their admission in the Court of Appeal, that they were ready to provide for him in the event of his yielding obedience to their wishes; had he been a stranger what necessity existed for their coming forward with an offer of any provision in his favour? The former *vyuvustha* of the pundits of this Court is entitled to no weight, owing to the strong suspicion which exists of the corruption of Sobha Shastree. The respondents themselves say, in answer to the petition for a special appeal, that the pundits are not in the habits of writing a *vyuvustha* without receiving something; and that they would write any thing to serve the purpose of the petitioner, though contrary to law. It is probable that the briber, Kashee, has brought forward this assertion by way of experiment with reference to the state of the case, and in conspiracy with the corrupt Sobha. Although the *vyuvustha* in question bore the signature of both pundits, yet it is a notorious fact that the exposition of the law connected with the Western Provinces rested solely with Sobha Shastree, and that Ramtunnoo, the other pundit, merely affixed his signature by way of form. From all the evidence adduced in this case, and, indeed, from the admissions of the parties themselves, it has been clearly shewn that the alienation by gift and sale of this kind of *birt* is frequent and usual. From the answer delivered by the new pundit Bydianath Misser, it appears, that there is no objection to make an alienation of the *birt* in favour of a *Mahabrahmin*. It is only forbidden to transfer it to one who is incapable of performing the duties; consequently there existed no objection to an alienation of it by Pullut Pande in favour of his adopted son, who was also a *Mahabrahmin*, to whom, indeed, it would have appertained by the law of inheritance, after the death of Pullut Pande, had he not acquired it by gift during the lifetime of that individual. How this can be deemed objectionable or illegal it is not easy to conjecture. The assertion of the respondents, that Ram Sunhye Pande was the only son of Byja Tewaree has been satisfactorily refuted in my proceeding dated the 26th of February of the present year. It has been proved by the evidence of witnesses, that Byja Tewaree had another son, named Lal Chand; nor is it at all consistent with probability, bearing in mind the tenets of the Hindoo religion, that the said Byja would have given away his only son to another. Different opinions have been delivered as to the validity of an adoption of an only son. The law probably is, that though the act involves a moral offence, punishable in another world, yet that it cannot be set aside in this. I am for these reasons of opinion, that the attempt on the part of Kasheenath and Sungum Pande to usurp the whole property of their father and uncle, to the exclusion of

their uncle's adopted son, is altogether futile, and furnishes evidence of their wickedness and injustice. I am further of opinion, that the decree of the Patna Court of Appeal, dated the 9th of April 1820, should be reversed; and the decision of the Zillah Court dated the 12th of November 1816, affirmed; that the costs of all three Courts should be made payable by the respondents; that the appellants should be put into possession of the disputed *birt*; that the respondents should pay to them the mesne profits accrued from the period of their being put into possession under the order of the Provincial Court; that the third party, Mussum-maut Nolka, be desired to institute a regular suit with a view to the establishment of any claim she may have against the property, and that one quarter of the established fees be paid to the *vakeels*, on account of the review of judgment." But the Officiating Chief Judge (J. H. Harrington) and the Fifth Judge (W. B. Martin) thought that as the review of the judgment of the Chief and Fourth Judges had been admitted merely for the purpose of ascertaining the validity, or otherwise, of the *vyuvustha* delivered by Sobha Shastree, and as the said *vyuvustha*, on being compared with that delivered by the present pundit, Bydianath Misser, appeared to be correct, the case ought not to be again tried, or otherwise meddled with. The Fifth Judge added that, though from the pundit's answer to the fourth question, it appeared that if several sharers have possession of *Birt Mahabrahminee*, and the *parehs* or divisions into days are fixed, the interest of the sharers of each *pareh*, is distinct and separate; yet that such did not appear to be the case with respect to the property in dispute: that in the opinion of the Chief and Fourth Judges, who had formerly disposed of this case, the adoption by Pullut Pande of the father of the appellants had been disproved; and that admitting it to have been proved, it had been ruled to be illegal, from the circumstance of his having been the only son of Byja Tewaree. They therefore passed a final judgment on the 10th of February 1825, confirming the decision passed by the Chief and Fourth Judges on the 30th of June 1823. The costs were charged to the appellants, and it was ordered that the *vakeels* should receive one-fourth of the full fee for their trouble in carrying on the review.

The order usual in the case of pauper suitors was passed with regard to the costs.

1825.

July 2nd.

**SHEIKH DAHOO, Pauper, Appellant,
versus
THE COLLECTOR OF PURNEA, for the COURT OF
WARDS, Respondent.**

After a *raceenamah* had been filed the plaintiff pleaded that the execution thereof had been forced : but though repeatedly desired to prove his assertion, failed to do so. The Provincial Court dismissed the suit and the Sudder Dewanny Adawlut confirmed the decision.

THE appellant instituted two actions in the Provincial Court of Moorshedabad *in formd pauperis*, on the 29th of January 1819. The first, (No. 2, of 1819), against Mirza Ahmed Ali Khan, manager of the estate of the zemindars of Purnea and others, to recover the sum of 14,108 rupees, 10 anas, 1½ pie ; being the amount of certain items of which he claimed a reduction from his *moos/aja ee pottah* of pergunna Suttanpoor, one of the *mehals* of Hawelee Purnea : and the second, (No. 3, of 1819), against the said manager, to recover the sum of 21,531 rupees, as a balance of revenue due to him from the said farm, after paying the rent due to the estate.

He pleaded, that he obtained a farm of the said pergunna from Raja Sri Narain Rai, the zemindar, for the years 1224 to 1227 *Moolkee*, both inclusive, at an annual *jumma* of 59,388 rupees, 15 anas, 1½ pie : that disputes arising between the members of the family of the zemindars, Mirza Ahmed Ali Khan was appointed manager of the whole estate : and dispossessed him from the farm, thereby depriving him of a balance of 21,531 rupees, which was due to him from the under farmers and tenants, as the balance of the *moofussil* collections, for the year 1224 *Moolkee*, after deducting the sums payable to the estate under his *pottah*. He also stated, that he had a just claim to a deduction, from the sum actually paid by him of 14,108 rupees, 10 anas, 1½ pie, on account of certain charges, some of which had been allowed to former farmers, and others which the zemindar had agreed to deduct when he granted the farm. He therefore sued to recover from the estate of the said zemindars, in both suits, the sum of 35,639 rupees, 10 anas, and 1½ pie.

Mirza Ahmed Ali resisted the claim, stating that a large sum was still due by the plaintiff to the estate, and that he having instituted a summary suit against him for balance of revenue obtained a decree in the Zillah Court.

Before the two suits came to a final hearing, the Zillah Judge certified to the Court extracts from his proceeding, transmitting at the same time a *kistbundee*, or bond for the amount decreed against the plaintiff in the summary suit, whereby he acknowledged the validity of the claim made against him by the estate of the zemindars, and agreed to pay the sum decreed against him by the summary decree by instalments : and a *bazeenama*, or deed retracting his claim in suit No. 3, of 1819 ; and stated that the plaintiff had appeared before him in person, and acknowledged the execution of the said documents.

The plaintiff subsequently appeared before the Provincial Court, and denied the execution of the said deeds, stating that he being confined in the civil jail in execution of the summary decree, had been compelled to execute them against his will, and was directed by the Court to file proof in support of his assertion. As he

failed to do so, in spite of repeated orders, the opposite party ————— 1825.
declaring that he had executed them of his own free will, the Provincial Court dismissed both suits with costs on the 16th of July and 22nd of December 1821, the usual order being passed with regard to costs in cases of pauper plaintiffs.

The plaintiff appealed from both the said decisions, on the plea that his objections against the *kistbundee* and *baznama* had not been inquired into: and the manager having been removed, the suit was defended by the Collector of Purnea on the part of the Court of Wards: but the Court of Sudder Dewanny Adawlut (present C. Smith) being of opinion that as the plaintiff had neglected to produce proof of his assertion before the Provincial Court, notwithstanding the frequent injunctions of the said Court, he could not now claim to have his pleas investigated, confirmed the decisions of the Provincial Court of Moorschedabad and dismissed the appeal with costs, to be levied from his property in the event of any being found.

HURI KISHEN SING and others, Appellants,

1825.

versus

MUNSUB ALI, GOPEE KAUNT, RAM HURRUCK SING, July 5th.
and others, Respondents.

HURI KISHEN SING and others (the plaintiffs in this case, which was instituted on the 26th of December 1819, in the Zillah Court of Goruckpoor, and made over for decision to the Register stationed at Azimghur) were the zemindars of Talook Lohan, and entered into engagements for their zemindaree at the settlement made for the years 1216 to 1219 F. S.: considering the *jumma* assessed on their estates too heavy, they declined entering into engagements at the ensuing quinquennial settlement for 1220 to 1224 B. S., notwithstanding which they were confined, and their estate was sold on the 14th of June 1813, in satisfaction of the rent due for the year 1220 F. S., and purchased by Munsab Ali. And on his failing to make good the purchase, money it was again sold on the 9th of February 1814, to Gopee Kaunt, Ram Hurruick Sing and others, which second sale was confirmed by Government. They instituted this suit against Government and the auction purchasers, in the first and second instances, to set aside the sale; pleading that as they had not entered into engagements for the rent of 1220 F. S., the sale of the estate for the arrears of that year was irregular and contrary to the regulations.

The Collector of Goruckpoor defended the suit on the part of Government, and contended in his answer, that, notwithstanding the zemindars had signed no *kubooleyut* for 1220 F. S., yet as they, with the knowledge that the Board of Commissioners had issued a proclamation that the revenue of those lands for which no new settlement was made for 1220 F. S. would be levied

1825. — according to the *jumma* of 1219 F. S., did not resign the management of the estate, but continued to collect the rents of 1220 F. S., Hurikishen and had paid only 11 rupees for that year into the treasury others, (purchasing, with the sum collected, the village of Chokee Deo Munsub Ali and Gaon), they were answerable for the whole revenue of the year, others. and that the sale was just and regular.

Munsub Ali, the first purchaser, did not appear to defend the suit. Ram Huruck Sing and others, the persons who purchased the estate at the second sale, pleaded that their purchase was regular, and left the defence of the suit to the Collector.

The Officiating Register stationed at Azimghur (I. V. Biscoe), was of opinion that, when the zemindars declined entering into engagements for the rent of 1220 F. S., as they were authorized to do by the fourth condition of clause 2, section 53, regulation 27, 1803, it was incumbent on the Collector, under the 9th clause of the said section, to have entered into the proper arrangements for the rent of the estate, independent of them, and that the sale was illegal under the provisions of the 1st and 9th clauses of regulation 25, 1803, no settlement for the said lands having been formally concluded. He therefore passed a judgment in favour of the zemindars on the 28th of January 1819, setting aside the sale, and ordering that they should be again put in possession of the village; referring the auction purchasers to Government for the return of the purchase money. The costs of suit were charged to Government.

Huruck Sing and the other purchasers at the second sale, appealed from this decision to the Provincial Court of Benares.

The appeal was first taken up by the Officiating Judge (W. Cowell). He was of opinion, that as the zemindars were aware of a proclamation issued in conformity with a letter of the Board of Commissioners, dated 5th of January 1813, which directed that till a new settlement should be made, the rents of 1220 F. S. should be paid according to the *jumma* of 1219 F. S., they should have resigned the village to the Collector, and have refrained from interfering with the collections of 1220 F. S., whereas it appeared that they collected the whole of the rents of the estate, till 1221 F. S. when a *suzawul* was deputed to collect the rents after the first sale, at the repeated instances of the *tehsildar*, who reported that they would not refrain from interfering in the collection, although they had no *pottah* and had signed no *kubooleyut*. As therefore they collected the whole of the rents for the year 1220 F. S., for the balance of which year the estate was sold, and had paid to Government but 11 rupees for that year, he considered the sale valid and legal, and recorded it as his opinion, on the 3rd of April 1821, that the decision of the Officiating Register of Azimghur should be reversed, and the sale upheld.

The Senior Judge (A. Brooke) recorded his opinion on the 19th of July 1821, in favour of the decision of the Officiating Register, which he would have confirmed; for he held it highly unjust to sell an estate for the revenue of which no *kubooleyut* had been signed.

The Fourth Judge (R. H. Rattray), concurring with the Officiating Judge, passed a judgment on the 21st of July 1821, reversing

the decision of the Officiating Register of Azimghur, and upholding the sale. The costs were charged to the respondents. 1825.

The zemindar applied to the Court of Sudder Dewanny Adawlut HuriKishen for the admission of a special appeal. The Court after perusing Sing and the decision of the Zillah Register, the opinion of the Senior others, v. Munsub Judge of the Provincial Court of Benares, and a *roobukaree* of Ali and the Collector of Goruckpore, in which he acknowledged the others. receipt of a letter from the Board of Commissioners approving of the decision of the Zillah Register, and ordering him to carry it into execution, admitted a special appeal. As neither the Collector nor Munsub Ali, the first auction purchaser, nor Gopee Kaunt, one of the second auction purchasers, appeared to defend the appeal, notices were issued, calling on them to do so, if they had any thing to urge. The superintendent of law-suits filed a *durkhast*, stating that Government had no further concern in the case, the name of Government was therefore struck out of the number of respondents ; the other persons did not appear.

The Second Judge (C. Smith), after perusing the proceedings, recorded it as his opinion on the 7th of March 1825, that no order of the Board of Commissioners could supersede the existing regulations of Government, wherein it is laid down, that no land can be brought to sale for arrears of public revenue unless a *kubooleyut* has been signed by the zemindar. He was therefore of opinion that the sale was illegal and should be set aside.

The Officiating Judge (C. T. Sealy) concurred with the Second Judge in thinking the sale invalid, and accordingly passed a final judgment on the 5th of July 1825, reversing the decision of the Provincial Court of Benares, and confirming that passed by the Officiating Register of Azimghur.

The costs of the second appeal were charged to the respondents.

1825.

July 15th.

JYE NARAIN MOKERJEE, Appellant,
versus
 BUL RAM RAI, Respondent.

Action to recover profits of a partnership in trade entered into without any written agreement. According to the Hindoo law, though it is unlawful in Bramins to traffic, yet on closing their accounts they are entitled to their respective share of the profits of such traffic.

THE appellant sued the respondent in the Zillah Court of Agra (on the 23rd of August 1816), to obtain from him the sum of 1,560 rupees, 5 anas, 9 pie, being the principal and interest of a share of profits arising from a partnership in trade.

He stated in his plaint, that he had traded in partnership with the defendant, and from the beginning of 1812 to the end of 1813, he was, by agreement, entitled to one-third of the profits, which share amounted to 820 rupees, 14 anas, 6 pie : after which they carried on business, he having a fourth share in the business : that in 1814 they purchased goods in Calcutta to the value of 1,827 rupees, 13 anas, which were sold at Agra for 3,217 rupees, 10 anas, giving a profit of 1,389 rupees, 13 anas, and that he had deposited with the defendant 1055 empty bottles : and as the defendant withheld from him his share of the profits of the trade, he instituted this suit to recover from him the sum due to him as below :

The balance of 820 rupees, 14 anas, 6 pie, after deducting therefrom 456 rupees, 15 anas, 3 pie, being one-fourth of the prime cost of the goods purchased in 1814.	R. 363	A. 15	P. 3
One-fourth of the prime cost of the goods.	456	15	3
One-fourth of the profits on the said adventure....	347	7	3
Value of 1055 empty bottles.	172	5	6
	1,340	11	3
Interest thereon to the end of July 1816.....	219	10	6
	1,560	5	9

The defendant denied that he had ever traded in partnership with the plaintiff, and challenged him to produce any deeds entered into between them, on the formation of such partnership. He stated that he had employed the plaintiff as his agent in some money transactions, in which he had defrauded him, and that he had instituted this action in anticipation of a suit which he, the defendant, had intended to bring against him to compel him to refund the money which he had in his hands.

After taking the evidence of the witnesses named by the parties, the Judge was of opinion that the defendant had failed to establish the pleas urged by him against the claim of the plaintiff; and that the plaintiff had clearly established the existence of a partnership between himself and the defendant (the validity of which he did not consider at all affected by its having been conducted by mere verbal agreement, without written deeds, partnerships on verbal agreement being matters of frequent occurrence), and that the sum of 820 rupees, 14 anas, in money, together with 1055 empty bottles, the property of the plaintiff, had remained in the hands of the defendant; that the dispute between the parties

was referred to a *punchayut*; from the proceedings of which, it was proved that goods had been purchased in Calcutta on account of the joint concern, for the purchase of which the sum of 456 rupees, Jye Narain 15 anas, was paid out of the 820 rupees, 14 anas, as the plaintiff's Mokerjee, fourth share in the adventure; and that the balance, 363 rupees, v. Bul Ram Rai. 15 anas, was deposited by the defendant, on account of the plaintiff, with some *shroff* in Calcutta; that the defendant appeared to be indebted to the plaintiff as follow:

On account of the first transaction:	R.	A.	P.	R.	A.	P.
Amount placed in deposit by the defendant with the Calcutta <i>shroff</i> on account of the plaintiff	363	15	0			
Price of 1055 bottles, estimated at 12 rupees per hundred	126	9	6			
	<hr/>	490	8	6		

On account of the second transaction:	R.	A.	P.	R.	A.	P.
Advanced on account of the plaintiff's fourth share of adventure..	456	15	6			
One-fourth of the profits.	347	7	0			
	<hr/>	804	6	4		
Total of principal.....	1,294	15	0			
Interest from different dates to the institution of the suit	219	10	0			
	<hr/>	1,514	9	0		
	<hr/>					

He therefore passed a judgment on the 22nd of June 1819, decreeing that the defendant should pay to the plaintiff the sum of 1,514 rupees, 9 anas. The plaintiff also claimed the sum of 440 rupees, 4 anas, as interest on the said sum, from the date of the institution of the suit to the date of the decree. The Judge did not however deem him entitled to interest, but declared that if he persisted in the demand, he was at liberty to try his right thereto by a regular civil action.

The case having been appealed to the Provincial Court of Bareilly, the Third Judge of that Court (C. Elliot) observed, that the respondent had filed no deed of partnership entered into between himself and the appellant, and that none of the witnesses had deposed that the parties in their presence ever entered into any verbal agreement to trade in partnership, and that the respondent had produced no evidence to prove that he ever advanced a rupee for the-furtherance of a joint trade: that so much appeared from the evidence, that a dispute did exist between the parties regarding some unsettled account, and that some of the respondent's witnesses called themselves arbitrators, though no arbitration bond, or award of the arbitrators was forthcoming. For these reasons he recorded it as his opinion, that the decision of the Zillah Judge should be reversed, and the claim of the respondent, the original plaintiff, dismissed.

The Senior Judge (F. Hawkins) was of opinion, that it was

1825. proved that a partnership had been entered into by the parties by verbal agreement, in which partnership the respondent was to Jye Narain receive one-fourth of the profits: that a dispute arising between the Mokerjee, parties, it was referred to arbitrators; and that Punchanun, alias v. Bul Ram Rai. Punchanurain, deceased, one of the arbitrators, having inspected

the accounts in the presence of the parties and his colleagues, it was found that the appellant had in his hands the sum of 820 rupees, 14 anas, 6 pie, and 1055 bottles belonging to the respondent. He therefore recorded it as his opinion, that the decision of the Zillah Judge of Agra should be amended, and that the appellant should pay to the respondent the sum of 820 rupees, 14 anas, 6 pie, the balance of cash; and 131 rupees, 14 anas, the price of 1055 bottles at 2 anas a bottle, making the sum of 952 rupees, 12 anas, 6 pie, principal, with the sum of 471 rupees, 10 anas interest thereon, at 9 per cent per annum from the commencement of 1815 to the date of his *roobukaree* (3rd of July 1820,) being a period of 5½ years, making a sum total of 1,424 rupees, 6 anas, 6 pie.

The Fourth Judge (J. C. Oldham) concurred in the opinion expressed by the Third Judge, and accordingly, on the 15th of July 1820, reversed the decision of the Judge of Zillah Agra, and dismissed the claim of the original plaintiff with costs.

The original plaintiff on this moved the Court of Sudder Dewanny Adawlut for the admission of a special appeal, and the Court (present C. Smith, Second Judge, and S. T. Goad, Third Judge), being of opinion that a special appeal was admissible on the grounds of the claim of the petition having been dismissed by two Judges of the Provincial Court, in opposition to the opinions of the Zillah Judge and the Senior Judge of the Provincial Court, admitted the appeal.

The case came on in the first instance before the Second Judge (C. Smith). It appearing from enquiries that the article in which the parties traded was brandy, the following question was put to the Hindoo law officers of the Court, with a view of ascertaining the Hindoo law, as applicable to the case: "If two Bramins engage in a partnership in trading in wine, is this species of trade correct or not, according to the *shasters* current in Bengal and Hindoosthan? And if it be improper, can one partner sue the other for a share of the profits?" The pundits gave the following answer: "According to the *shasters*, it is not proper for Bramins to trade in wine. If, however, two Bramins have acquired wealth by matters prohibited by the *shaster*, the share of each in the said wealth is equal."

On consideration of the whole of the proceedings, the Second Judge observed, that the second partnership for the purchase and sale of English goods did not appear to be proved; but that it was satisfactorily established by the evidence of the witnesses, that the sum of 820 rupees, 14 anas, 6 pie, was due by the respondent to the appellant, on account of the first partnership, in which the parties purchased and sold wine, and that the appellant had deposited with the respondent 1,055 bottles, the value of which it was incumbent on the respondent to pay, and that the opinion of the Senior Judge of the Provincial Court was correct,

as far as related to the principal: but that it was improper to award interest on such a transaction: that though the pundits had declared the traffic of wine by Bramins contrary to the *shaster*, they had declared the Bramins entitled, after closing their accounts, to share alike in any profits which might arise from such traffic; and that the punishment of Bramins for dealing in wine was not a matter for the consideration of a Civil Court. Leaving that point therefore undecided, he recorded it as his opinion, that the respondent should pay to the appellant the sum' of 952 rupees, 12 anas, 6 pie, as h's share of the profits.

1825.

The Fifth Judge (W. B. Martin) concurred in the opinion expressed by the Third and Fourth Judges of the Provincial Court, and recorded it as his opinion that the decision passed by them should be confirmed.

The Officiating Judge (C. T. Sealy), being of opinion that it was proved that a partnership did exist between the parties by verbal agreement, and that the sum of 820 rupees, 14 anas, 6 pie, was due by the respondent to the appellant, as the balance of cash, and 131 rupees, 14 anas, as the value of 1055 bottles deposited by the latter with the former, passed a final judgment, on the 24th of February 1825, annulling the decree of the Provincial Court, and amending that passed by the Zillah Judge of Agra, and ordered that the respondent should pay to the appellant the sum of 952 rupees, 12 anas, 6 pie. The costs were charged to the respondent.

**ZORAWUR SING, AJAIB SING, and SOOPHAL SING, (Heirs
of PERTHEE PUT SING, deceased), Appellants,
versus**

**ZOR SING, DEYSEE SING, and KURTA SING, (Heirs of
ZALIM SING, deceased), Respondents.**

THIS suit was instituted *in forma pauperis* by Zalim Sing, in the Zillah Court of Allahabad, on the 6th of July 1808, to recover possession of mouza Bhute i, pergunnah Areej, the annual produce of which was estimated at 900 rupees, from Perthee Put Sing. He stated that the village was the hereditary estate of his family, and that the defendant took *possession* thereof in 1200 F. S., that during the time the country was under the Government of the Nuwab Vuzeer he did not bring forward his claim, as he had no hope of redress : but he instituted the present action, hoping for redress from the justice of the British Courts.

Perthee Put Sing claimed the village under a deed of sale duly executed on 27th of *Rumzan* 1200, *Hijre*, by Bukt Sing, the zemindar, who sold the estate to him in consideration of the sum of 544 rupees, and pleaded that as he had undisturbed possession under the deed of sale for 23 years, the plaintiff's claim was barred by the rule of limitation.

1825. — The plaintiff in his reply, stated that Bukt Sing was his younger brother, and had no right to sell the estate : and that the defendant had moreover extorted the deed of sale pleaded by him from Bukt Sing, so that it was not valid. The defendant, in his rejoinder, stated that Bukt Sing was the elder brother of the plaintiff ; that he was the responsible zemindar : and that according to the custom of the country under the Government of the Nuwab Vuzeer, he was the person who had the power of selling or mortgaging the estate.

Before the suit came to a final hearing, the plaintiff dying, was succeeded by his heirs, the present respondents.

After having perused the whole of the documents, and examined the witnesses of the parties, the Judge (J. D. Erskine) was of opinion that the plaintiff had been unable to prove that any violence had been used to compel Bukt Sing to execute the deed of sale : and the witnesses of the defendant had clearly proved that Bukt Sing, the brother of Zalim Sing, the original plaintiff, sold the village of his own free will to Perthee Put Sing, in order to raise money to pay the rent due to the existing Government : that they (deponents) attested the deed of sale at his express desire, and that Perthee Put Sing had undisturbed possession of the village from the day of sale. He accordingly dismissed the claim with costs on the 28th of February 1810.

The plaintiffs appealed to the Provincial Court of Benares, and the appeal was defended by the present appellants, the heirs of Perthee Put Sing, who had demised.

The Provincial Court, after perusing the whole of the proceedings of the Zillah Court, examined another witness named Ram Gholam. They were of opinion, that it was proved by the evidence, that Perthee Put confined Bukt Sing in his own house for some days, and afterwards carried him to the *tehsildar's* cutchery, and compelled him to execute the deed of sale, and that although the witnesses of the respondents deposed that Bukt Sing executed the deed of his own free will, that they attested it, and Kazee Ouid Ali (one of the said witnesses), affixed his seal thereto by the desire of Bukt Sing, there was in their evidence an evident leaning towards the respondents : They observed that Ram Gholam, the *canoongo* of the pergunnah, deposed that no balance of rent was due by Bukt Sing to the existing Government at the time of the alleged sale ; that the signature of Bukt Sing and some of the attesting witnesses appeared to be written with fresher ink than the writing in the body of the deed ; so that the deed itself was open to suspicion, and that as Bukt Sing had other brothers then living, he had no right to sell the estate without their consent. They considered the notorious fact of the influence which Perthee Put Sing had with the *tehsildar* during the time of the Nuwab Vuzeer, a sufficient reason for the original plaintiff not having brought his action in any court of justice within twelve years after the dispossession. For these reasons they reversed the decision of the Zillah Judge and passed a decree on the 31st of March 1821, awarding to the appellant possession of the village, and charged the costs of both Courts to the respondents.

The respondents having moved the Court of Sudder Dewanny 1825.
Adawlut for the admission of a special appeal, the Court, on consideration of the undisturbed possession of Perthee Put Sing for 23 years, and the presumption that no violence was used, and not being satisfied with the explanation of the delay in instituting the suit, admitted a special appeal.

Zorawur
 Sing and
 others, v.
 Zor Sing
 and others.

The Court (present C. Smith and C. T. Sealy), on perusal of the whole of the proceedings, were of opinion that it was clearly proved by the evidence of Kazee Oulad Ali, *Kazee* of the pargannah Areel, and other most respectable witnesses, that Bukt Sing executed the deed of sale on the 17th of *Ramzan* 1200, *Hijree*, in the *cutcherry* of the *tehsildar*, as was then the custom, for a balance of rent due to the ruler of the country, in favour of Perthee Put Sing, who appeared to have been his security to the Government. With regard to the evidence of Ram Gholam, the witness examined by the Provincial Court, they did not consider his evidence entitled to any credit, as, by his own statement, he was at enmity with Perthee Put Sing, whom he accused of having slain his father. As, therefore, Perthee Put Sing had undisturbed possession of the village from the time of sale to the date of the institution of the suit, a period of upwards of 20 years, they were of opinion, that the suit should have been thrown out in the first instance, under section 18, regulation 11, 1803, and accordingly reversed the decision of the Provincial Court of Benares, on the 21st of July 1825, and confirmed the decision of the Judge of Zillah Allahabad, and directed that the respondents, who, on the execution of the decree of the Provincial Court, had obtained possession of the village, should restore it to the appellants, and account to them for the mesne profits received by them during the period of their possession.

The whole of the costs were charged to the respondents.

1825.

SYDANI SALEH-OONISSA CHOWDRAYN, Appellant,

*versus*Sept. 21st. BHOBUN MOHUN LAHARI, and ANUND NATH NEOKEE,
Respondents.

Claim to recover money under a bond ; dismissed : the Court not believing the evidence of the witnesses of the plaintiff, chiefly owing to their want of respectability.

THE respondents instituted this suit on the 15th of September 1819, in the Provincial Court of Moorsheadabad, to recover from Sydani Saleh-oonissa Chowdrayn the sum of 24,001 rupees, principal due on a bond dated 21st of *Magh* 1223 B. S., and 7,440 rupees, interest thereon, making a sum total of 31,441 rupees. It was set forth in the plaint, that the defendants having occasion for the sum of 24,001 rupees, caused a bond for that sum, payable by the month of *Magh* 1224 B. S., with interest at the rate of 12 per cent per annum, to be drawn out in the name of Bhabun Mohun Lahari (plaintiff) and of Roopnath Neokee, deceased, and executed it in the usual manner on the date aforesaid, affixing her seal thereon in the presence of the attesting witnesses : that Usud Oozuman Chowdry, the husband of the defendant, received the money from them on the 28th of the same month, and endorsed his receipt on the back of the bond, which he caused to be duly registered; that the period by which she engaged to repay the money had elapsed without payment, and that she refused to pay it. They therefore, Bhabun Mohun on his own behalf, and Anund Nath Neokee, as heir to Roopnath Neokee deceased, instituted this suit to compel her to do so.

The defendant denied both the debt and the bond. She stated that Sheeb Shunkur Neokee, the uncle of Anund Nath Neokee, and the master of Bhabun Mohun, was formerly in her employ, and had the sole control of her landed estate; and had embezzled property to a large amount. And that it was not to be wondered at, if he had taken advantage of her situation, and forged the bond which was the cause of the present action, in order to defraud her, while he had her seals in his custody.

The Senior Judge of the Provincial Court (W. T. Smith) was of opinion that the due execution of the bond by the defendant, and the receipt of the money by Usud Oozuman her husband, were clearly proved by the evidence of Radha Nath, Fakir Chand and Ram Lochan the attesting witnesses. He therefore passed a judgment in favour of the plaintiffs on the 16th of April 1821, directing the defendant to pay the plaintiffs the sum claimed with interest up to the date of his decree. The costs were charged to the defendant.

She appealed to the Court of Sudder Dewanny Adawlut. The Second Judge (C. Smith) was of opinion that the claim of the respondents was not satisfactorily proved. He did not consider the registry of the bond regular. He observed that Ram Kishen Mujmoodar, the first witness of the respondents, did not depose to the actual payment of the money to Usud Oozuman and that, of the attesting witnesses, Ram Lochan stated that he had gone to beg a rupee from the plaintiff, and Radha Nath, that he waited on her to get service: their evidence he considered unworthy of credit, as it was customary for respectable zemindars to call on

respectable persons to attest their deeds, and not on beggars; and 1825. that Fakir Chand deposed that he did not see the bond signed and sealed, having heard of it from the two former witnesses. He Sydani also observed, that Neelkaunt, the writer of the bond, deposed that Saleh-Oo-when he wrote it by the desire of Sheeb Chunder Neokee, the name nissa of the appellant was written on the paper, but that her seal was Chow-drav, not affixed thereto, and that he was ignorant of any subsequent v. Bhobun loan; that his evidence was corroborated by Jharroo Chowdry: Mohun and Lahari and that the plea of the *vakeel* of the respondents in the Provincial Court, that he was not the Jharroo whom they named, was Nath Neo-unworthy of credit, as it was evident that they put in this plea on finding that he would not give the evidence they desired. Under these considerations, he recorded it as his opinion, on the 16th of April 1825, that the decision of the Provincial Court of Moorshe-dabad should be reversed, and the claim of the respondents dismissed with costs in both Courts.

The Officiating Judge (C. T. Sealy) concurring in this opinion, passed a final judgment to this effect on the 21st of September 1825.

SURROOP SING, Pauper, Appellant, 1825.
versus

DHOWKUL SING, OODWUNT SING, DIR.JPAUL SING, and Sept. 21st.
GUNDURP SING, Respondents.

THIS suit was instituted *in formd pauperis*, in the Provincial Claim for Court of Benares, on the 11th of July 1818, by Surroop Sing, to recover possession of an 8 ana share of the zemindaree of talook Surawun, Mydee Muksul, Rusoola Bhinket, Bursuttee Khas, and Poora Kuneja, situate in perganna Mundeahoo, zillah Juanpoor, the rule of the hereditary estate of his family, from the respondents, laying his action at 10,174 rupees, 8 anas, being three times the *sudder jumma* thereof.

The following is a genealogical sketch of the family :

an ancestral estate adjudged; limitation not being applicable to the case of putter-dars deriving a share of profit.

The plaintiff stated, that Buktawur Sing, the son of Ajub Sing, was the first acquirer of the estate, and that he had possession thereof till his death in 1827 *Sumbut* era (1178 F. S.): that as he left no issue, Muhum Sing, his half brother, took the management of the estate, with the consent of the widow of the deceased (Ram Perkash Sing, the plaintiff's father, the nearest heir to the deceased being yet a minor): that Ram Perkash Sing, on coming of age, managed the household concerns, and Muhum Sing the zemindaree: that on the death of the latter, the settlement of the village was concluded in 1197 F. S., by the mutual consent of the family, in the name of Sheo Umr Sing, his son, it being customary in the province of Benares for one or more of the sharers to stand forward as engaging proprietors, the rest of the family participating in the profits of the estate according to their respective shares: that on his death, in 1198 F. S., Dhowkul Sing took possession of the estate, and held it without any *sunnud* till 1290 F. S.: that in 1210 F. S., the plaintiff and the defendants obtaining a *pottah* from Government had joint possession till 1212 F. S., when the estate was sold by public auction in satisfaction of arrears of revenue, and purchased by Mirza Gholam Nukshbund Khan, who had possession till 1219 F. S., when the sale being set aside by a decree of Court, the defendants recovered possession, and paid him his share of the profits till 1224 F. S., after which they dispossessed him of the land in his own cultivation, and refused him his share of the profits. He therefore instituted this suit claiming possession of one-half of the estate.

The defendants denied the plaintiff's claim, and pleaded that the estate was originally acquired by Muhum Sing, that they had from the first acquisition undisturbed possession thereof, and that neither the plaintiff nor his ancestors ever had possession of any portion thereof or any interest therein.

After receiving the documents of the parties, and examining their witnesses, the Senior Judge of the Provincial Court of Benares (W. A. Brooke) was of opinion that the plaintiff had not proved that either his ancestors or himself ever had possession of the estate, and that as the defendants had held it for so long a time, his right of action was barred by the rule of limitation. He therefore dismissed the claim on the 30th of December 1820, with costs.

The plaintiff appealed from this decision to the Court of Sudder Dewanny Adawlut, and was allowed to plead as a pauper. The respondents did not appear to defend the appeal, although duly summoned.

The case was first taken up by the Second Judge (Courtney Smith). On perusal of the whole of the proceedings, he was of opinion that it was proved that the talook of Surawun, &c., situate in perganna Mundehoo, zillah Juanpoor, was the ancestral estate of the family of the parties, and that during the confusion and misrule, which existed in the time of Raja Bulwunt Sing, it was for a time lost to the family, until Thakoor Buktawur Sing, the son by the first wife of Ajub Sing, regained possession, since which time it had remained in the family: that at the settlement of 1197 F. S. Sheo Umr Sing, the elder brother of the respon-

Surroop
Sing, &
Dhowkul
Sing and
others.

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Sing and
others.

dents, got a *pottah* for the estate, as an hereditary talook from the Resident of Benares, and retained possession until his death, when a *pottah* was granted to the respondents; and that there was no proof that the descendants of Indur Sing, full brother of Thakoor Buktaur Sing, ever separated themselves from the family, or ceased to participate in the profits of the estate. He therefore considered the estate to be the rightful inheritance of the descendants of Ajub Sing, by his two wives. He did not consider the plaintiff entitled to a moiety of the estate: for it appeared by the genealogical table, the correctness of which was proved by the evidence of the witnesses, that 4 *anas* would go to the descendants of Rughoonath Sing, and 4 *anas* to the descendants of Byjnath Sing, the sons of Indur Sing; and that of the share of Rughoonath Sing, one-half (or 2 *anas* of the whole estate) would devolve on the descendants of Sewuk Ram, viz. the plaintiff and his brother Roop Sing, and the other half on the descendant of Munwa Sing, viz. Koorhoo Sing. As Roop Sing, the younger brother of the plaintiff, messed with him, the Second Judge was of opinion that a decree might be passed awarding to him, with the plaintiff, on the sole prosecution by the plaintiff, the two *anas* to which they were entitled: but that this could not be done with regard to the shares of the descendants of Munwa Sing, the other son of Rughoonath, and of Oodwun Sing son of Byjnath, as they were not parties in the suit. He did not concur in the opinion of the Senior Judge of the Provincial Court, that the cognizance of the suit was barred by the rule of limitation. He observed, that as Muhum Sing, the father of Sheo Umr Sing and the respondents, had possession subsequent to the 1st of July 1775, the plaintiff's right of action was saved by section 35, regulation 23, 1795; that Ram Perkash Sing, the father of the plaintiff, had no occasion to bring forward a claim in any Court, as he received his share of the profits, and had no cause to be dissatisfied: but that the plaintiff had brought his action within twelve years from the time when the defendants refused to allow him to participate in the profits of the estate. Under these considerations, he recorded it as his opinion, on the 29th of November 1824, that the appellant was entitled, in conjunction with his brother Roop, to possession of a 2 *ana* share of the whole estate in question.

The case was next laid before the Officiating Judge (C. T. Sealy). He observed, that the appellant stated in his plaint that Buktaur Sing died in 1827 *Sumbut*, and in his petition of appeal that he died in 1823 *Sumbut*; and that after his death Muhum Sing had possession of the estate as manager. He did not think the evidence was sufficient to establish the fact, that either the ancestors of the plaintiff, or the plaintiff himself, had since that period possession of any portion of the estate. He therefore thought that the claim was barred by the third clause of section 15, regulation 22, 1795, which declares that no action for the recovery of possession of land shall be cognizable, when the party had been dispossessed antecedent to the 1st of July 1775, corresponding with the year 1832 of the *Sumbut* era, and recorded it as his opinion, on the 30th of June 1825, that the decision of the Provincial Court of Benares should be confirmed.

The case was lastly taken up by Henry Shakespear (Officiating Judge.) He concurred with the Second Judge with regard to the proof of the facts stated in his opinion, and observed, that although clause 3, of section 15, regulation 22, 1795, fixed the 1st of July 1775, as the period beyond which no cause of action should arise, yet the 2nd clause of section 35, of that regulation, saved to *puttees* the right of suing to recover possession of their shares, provided any one of the sharers had possession subsequent to the period fixed as the limit by the third clause of section 15. In concurrence therefore with the opinion of the Second Judge, he passed a final order on the 21st of September 1825, amending the decision of the Provincial Court of Benares; dismissing the plaintiff's claim to 6 anas of the village, and awarding to him and his brother Roop Sing possession of 2 anas thereof. One-fourth of the costs were charged to the respondents, and the rest to the appellant.

BUNEEYAD SING, Appellant,
versus
GHOLAM ALI, Respondent.

1825.

Dec. 3rd.

GHOLAM Ali sued Buneeyad Sing in the Provincial Court of Benares on the 21st of January 1817, to recover the sum of 4,575 rupees principal, and 2,765 rupees, 12 anas, interest on a bond, total 7,340 rupees. The defendant, though duly summoned, failed to appear to defend the suit, and the execution of the bond, and payment of the money being fully proved, an *ex parte* decision was passed on the 30th of September 1820, awarding to the plaintiff the principal sum lent, with interest thereon at 12 *per cent per annum* from the date of the bond to the day of payment, provided such interest did not exceed the principal. The costs were charged to the defendant.

The defendant appealed to the Court of Sudder Dewanny Adawlut from this decision, denying the execution of the bond; but as he neglected to appear within the period allowed by a proclamation ordering him to attend and prosecute his appeal by a given day, the appeal was dismissed on default. It was, however, subsequently readmitted on his shewing cause for the delay.

On perusal of the whole of the proceedings, the Officiating Chief Judge (C. Smith) saw no reason for altering the decision of the Provincial Court as far as related to the justice of the claim of the respondent. He observed, that the decision of the Provincial Court in awarding only interest equal to the principal was not conformable to a decision passed by this Court in the case of Baboo Janki Pershad, appellant, *versus* Raja Oodwunt Nurain Sing, respondent, in which interest was awarded from the date of the bond, though it greatly exceeded the principal; yet as the respondent had not appealed from that part of the order, the decision could

1825. — not be altered. As, however, the interest had already exceeded the principal, he passed a final decision on the 3rd of December 1825, confirming the decision of the Provincial Court of Benares, and awarding to the respondent the sum of 9,150 rupees, as the consolidated sum of principal and interest; and interest on that sum from the date of his decree to the day of payment at the rate of 12 per cent per annum; the costs were charged to the appellant.

1825.
Dec. 7th.

PREAG SING, Appellant,
versus
AJOODYA SING, Respondent;
and
AJOODYA SING, Appellant,
versus
PREAG SING, and CHUKUN SING, Respondents.

The heirs of a deceased Hindoo in Shahabad, being a real and an adopted son : the adopted son takes one-fourth, and the real son three-fourths of his property.

AJOODYA Sing instituted a suit in the Provincial Court of Patna, on the 24th of April 1817, to recover from Preag Sing and Chukun, a moiety of the share of Goody Sing, his father, in the talooks of Khrupoor, Agursoonda and Koondree, in perganna Arra, zillah Shahabad ; and to recover the mesne profits thereof for the year 1824. Suit laid at 6,244 rupees, 1 ana.

He stated that the family property was held in joint tenancy by three brothers, Chukun Sing, Goody Sing and Ajaib Sing till 1822 F. S., when, after the death of Goody Sing, Chukun Sing, his brother, petitioned the Collector for a separation, stating at the same time that Goody Sing had left heirs, the plaintiff, (his own son), and Preag Sing, (an adopted son); that he, plaintiff, denied the adoption of Preag Sing, who was in fact the son of Chukun Sing : but that the Collector, on perusing a document filed by Chukun Sing and Preag Sing, purporting to be a deed executed by Goody Sing, whereby he left to his real and adopted son equal portions of his property, put Preag Sing in possession of one half of his share, and the plaintiff of the other : leaving him, if dissatisfied, the option of suing Preag Sing to recover the same. He therefore instituted this suit to recover the said moiety from Preag Sing and Chukun Sing, denying both the adoption of Preag Sing and the execution of the said document.

The defendant stated that Goody Sing, having no son, adopted Preag Sing, the son of his brother Chukun Sing ; and that five years after the adoption, the plaintiff was born, and that Goody Sing before his death executed a deed granting his real and adopted sons equal shares of his property.

The Third Judge of the Provincial Court of Patna was of opinion, that it was proved by the evidence, that Goody Sing did really adopt Preag Sing before the birth of the plaintiff, his own son : but that the document filed by the defendant was unworthy of credit, being merely a copy, and unsupported by credible evi-

dence, so that the decision of the case depended on the Hindoo law. He therefore put the following question to the pundit of the Court "If a Hindoo adopt his brother's son; and after the adoption, his wife bear him a son; how, according to the *Shaster*, will his property be divided between his own son and his adopted son?" The pundit gave the following answer: "According to the Hindoo law as laid down in the *Mitakshura*, *Vyuvuhara*, *Mayucha*, and other tracts, the property will be divided into two parts: one of these parts will be again divided into four portions, of which one will go to the adopted son, and the rest of the property to the real son. This *vyuvustha* is according to the doctrine of *Vashishta* and *Catyayuna*." The Third Judge passed a judgment according to this *vyuvustha*, awarding to the plaintiff three quarters of the property claimed: and leaving in the hands of Preag Sing one quarter thereof, or one eighth of the whole share of Godry, and left Ajoodya Sing the option of suing the defendants to recover the mesne profits of the portion awarded to him, if they refused to pay them to him.

Both parties, Ajoodya Sing and Preag Sing, being dissatisfied with this decision, preferred separate appeals to the Sudder Dewanny Adawlut on pleas similar to those urged by them respectively in the Provincial Court. Previously to deciding on this case, the Court demanded an exposition of the law from their Hindoo law officers, in terms nearly similar to the question put to the pundit of the Court of Circuit, and received the following answer: "A Hindoo inhabitant of the district of Shahabad adopts his own brother's son: and afterwards has a son born to him. After his death his property will be divided into four parts, of which three parts will go to the real son, and one part to the adopted son: this *vyuvustha* is according to the *Mitakshura*, *Duttaca Mimansa*, and other tracts current in the district of Shahabad."

Authority: The text of *Vashishta* cited in the *Mitakshura*, *Duttaca Mimansa*, and other tracts. "If a person first adopt a son, and afterwards have a son born to him: after his death, one fourth of his property will go to the adopted son."

As this *vyuvustha* was not conformable to that of the pundit of the Provincial Court, the pundits of the Sudder Dewanny Adawlut were desired to explain. They stated in reply, that the answer given by themselves was correct, and borne out by the *Shasters*, and even by texts alluded to by the pundit of the Provincial Court: The text of *Vashishta* being the one given as the authority for their answer: and the text of *Catyayana* being as follows: "If after the adoption of a son, a son be born to the adopter, the adopted son will take one fourth."

The Court concurred with the Third Judge of the Provincial Court, as to the proof of the facts of the case, but under the *vyuvustha* of their pundits, they amended the decision of the Provincial Court, and passed a final decision on the 7th of December 1825, awarding one-half of the moiety claimed to Ajoodya Sing, and leaving Preag Sing (the adopted son) in possession of the other half, or of one-fourth of the whole property of Godry Sing. One-half of the costs of both Courts was charged to Ajoodya Sing and the rest to Preag Sing.

BIRJA SAHEE and others (Heirs of LUCHMUN SAHEE, deceased), Appellants,
versus

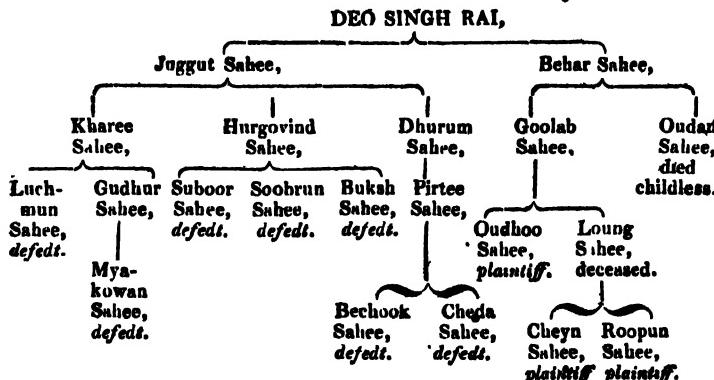
ROOPUN SAHEE and others, Respondents.

1826.

Jan. 16th.

THIS was a suit instituted in the Tirhoot Zillah Court, on the 16th of January 1812, by Oudhoo Sahee, Cheyn Sahee, and Roopun Sahee, against Luchmun Sahee, Soobrun Sahee, and the other appellants, to recover possession and be registered as proprietors of one moiety of mouzas Cuttulpore, Ram Puttee, Nowa, and Khotia, a *nizamut mehal*; a moiety of mouza Dhotalee, a seven anna share of which was *nizamut* and the rest *jageer* land; a moiety of a third of Rajgund, a *bruhmootter mouza*; and a moiety of mouzas Sultanpoor and Besee Byjnathpoor *Uslee* and *Dakhilee*, an *altumgha mehal* in parganna Tirsut, zillah Tirhoot. The action was laid at Rs. 505, the estimated annual produce.

The plaint set forth, that all the above mouzas, as well as Dostpoor Kundoe and mouza Bungtolah a *nizamut mehal*, constituted the hereditary estate derived from his grandfather by Deo Singh Rai (the ancestor of the plaintiffs); and the following genealogical sketch of his family was given in:



Claim to a share of certain landed property dismissed; as, though the parties were descended from the same ancestor, it was probable the property had been alienated from the family and reacquired by a different branch; and it not appearing that there was any trace of proprietary right or possession on the part of the claimants, since the Company's accession to the Dewanny.

According to family custom, the elder brother, by general consent, undertakes the management of the estate and other domestic affairs, and in conformity with this usage, Behar Sahee, the paternal ancestor of the plaintiffs, first engaged for the settlement for, and superintended the villages in dispute, and, after him, Dhurum Sahee, the ancestor of the defendants, who was succeeded by the defendants themselves, who were of the family of the elder brother Juggut Sahee. The matrimonial, exequial, and other necessary expences were defrayed by general consent from the proceeds of the villages in question, and the plaintiffs continued in possession of the Khoond-kasht lands, which had been occupied by their grandfather. According to ancient custom, a petition was presented to the Collector's office at the time of the decennial settlement in 1197, F. S. in the name of Luchmun Sahee, by his brother, the

1826. late Rughoonath Sahee for the *malgoozaree* of the villages in dispute ; and the proceeds of the estate were paid till 1199, F. S. Birja Sahee and others, and likewise from the end of that year till 1212, F. S. to the plaintiffs, who annually received Rs. 25, Rs. 20, and sometimes Rs. 15 as v. Roopun Sahee and others. proprietary dues. The plaint further stated, that the plaintiffs were in possession of ten beegas of land belonging to the sixth share of mouza Rajkund ; that the *ryots* of mouzas Ramputtee and Dhotolee, in consequence of two letters written by Rughoonath Sahee and sent to them by Dhurum Sahee, the ancestor of Cheda Sahee and Bechook Sahee, directing them to take pottahs for the lands which they cultivated from Qudhoo Sahee, (the plaintiff), who was the *putteedar* of half of the above mouzas, and to pay the revenue to him, had done so accordingly, and continued to pay the revenue ; that in 1204, *Fuslee*, Luchmun Sahee, one of the defendants, had registered the villages in dispute in the Collector's office, in the names of Suboor Sahee and Piitee Sahee, without informing the plaintiffs ; that he would not accede to their request of having their names entered in the Collector's books, and neglected to give an account of the profits and losses of their share when desired to do so by the plaintiffs ; that as there were eight villages and upwards of a ten-and-half anna share of a third of mouza Bungtolah, which had been publicly sold (for which the plaintiffs would sue hereafter) there still remained eight villages and upwards of a five anna one pie share, to a moiety of which the plaintiffs were entitled, viz. four mouzas and upwards of a two-and-half annas : from which, if mouza Dostpoor Kudneee were deducted (of which the plaintiffs were in possession, and settlement of which was sometimes included in the defendants, but generally in the plaintiffs *kaboolieut*) they were entitled to recover possession, and be registered as proprietors of three mouzas, and upwards of two-and-half annas, for which they accordingly now sued.

The defendants, Luchmun Sahee, Suboor Sahee, Myakowan Sahee, Bechook Sahee, and Cheda Sahee, stated in answer, that all the villages mentioned in the plaint composed the estate which had belonged to the ancestor of the parties ; that in 1155, *Fuslee*, the father and uncle of the plaintiffs sold the villages in pergannah Tirsut without the knowledge or consent of their (the defendants) ancestor, who lived in mouza Churwah, perganna Bisarah, zillah Hajeepoor, his ancestral estate ; that the whole of the villages in dispute remained in the possession of the purchasers till 1170 *Fuslee* ; that between the years 1171 and 1192 *Fuslee*, the defendants, while living separate, repurchased, at much trouble and expence, and with money realized by their exclusive exertions, all the villages sold by the plaintiffs' ancestors, by paying two or three times their value, and recovered the *kubalas* or deeds of sale : that in 1209 *Fuslee*, a robbery was committed in the house of the defendant Suboor Sahee, when a basket in which the papers were deposited was stolen among other property, but that there still were a few documents at the house of Luchmun Sahee, which would be produced on the investigation ; that no credit ought to be attached to the allegations of the plaintiffs, with regard to the matrimonial, exequial, and other necessary expences, having been defrayed from the proceeds of the estate in dispute, to their having received

malikana in cash, and to their being in possession of ten beegas of the *malikana* land; for the defendants, on seeing the distress of the plaintiffs, had, from a spirit of brotherly kindness, made over to them for their support five out of an hundred beegas of *malikana* land in mouza Rajkund, which was in their (defendants) possession, and consisted of two distinct parts, having been divided between them; that if the plaintiff's had really been co-sharers with the defendants, they would have been entitled to fifty beegas of *malikana* land; that likewise, when the petition was presented for the *nizamut* villages, by Luchmun Sahee in 1197, and the accounts of the profits and losses of the estate were made up by Luchmun Sahee, Suboor Sahee, and Pirtee Sahee, the three co-parceners, or when the settlement was made in 1202 *Fuslee*, for mouza Bungtolah, in the name of Luchmun Sahee, the names of the plaintiffs would also have been entered in the Collector's books, or in the *Kannoongo's* report on the sharers of the estate, furnished as required, in 1203 *Fuslee*, by the Collector, in consequence of disagreements between the partners; that if the plaintiffs had any claims on the estate in question, they would have brought them forward in the suits instituted by them against their (defendants) ancestors, up to the present day; that the plaintiff's statement, with respect to a separate settlement having been made for mouza Dostpoor Kundnee, and their being in possession of it, was altogether false, inasmuch as there was a decree of the Court to prove that the above mouza was the estate of a *minhaeedar*, and the cause was pending before the Sudder Dewanny Adawlut, in consequence of the *minhaeedar* having appealed: that if the *minhaeedar* had granted a *pottah* to the plaintiffs as *maliks*, such grant would not establish their proprietary right; that the two letters forged by the plaintiffs, purporting to be written to the *ryots* of mouzas Ram Puttee and Bungtolah by Rughoonath Sahee (who died in 1202 *Fuslee*), on behalf of Luchmun Sahee and Suboor Sahee, although they were able to write themselves, and falsely stating that Oudhoo Sahee (plaintiff) was the *putteedar* of a moiety of those villages, and directing them to take a *pottah* for the lands they cultivated from that person, would not prove the co-parcenary of the plaintiffs; and that the suit now instituted by the plaintiffs, notwithstanding they had disposed of the villages in dispute, was barred by the lapse of time, and was not therefore cognizable.

The answer of Soobrun and Buksh Sahee was to a similar effect.

On the demise of Soobrun Sahee, Suboor and Buksh Sahee alone appeared as his heirs.

On the 8th of September 1815. The Register of the zillah passed judgment to the following effect:

"The plaintiffs claim, on the ground of a proprietary right derived from their paternal grandfather, as established by their genealogical table; but their right is not corroborated by a single one of the eleven documents produced by them; for the *kubalas* or bills of sale, are dated 1165 F. S. whereas it has been proved by the testimony of six witnesses adduced by the defendants, that the father and uncle of the plaintiffs sold the villages specified in the plaint, and which formed the joint estate of the parties, in 1155 *Fuslee*; that the purchasers were in possession of them till 1170

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1826. *Fuslee*; that the defendants ancestor repurchased them while living separate, between the years 1171 and 1192 F. S.; and that the defendants have been, as set forth in their reply, in possession independently and exclusively of the plaintiffs or their ancestors. The *Moochukka* in the Sultanpore case, dated 1196, a copy of which has been filed by the plaintiffs (which states that the name of the plaintiff, Oudhoo Sahee, was entered with the names of Luchmun Sahee and the other defendants as "maliks," and thereby contradicts the statement of Hidayut Ali Khan, produced by the plaintiffs, which declares that Luchmun and Suboor Sahee had continued to receive the *malikana* or proprietary dues of Sultanpore) as well as the *farigh-khuttee* or deed of acquittance, *pottah*, and other documents relative to Dostpoor Kundnee, for which no suit has been instituted, are irrelevant to the present case. As the plaintiffs have stated in their plaint, and their witnesses, Birjoo and Mohun Sahee have deposed, that the plaintiffs have not been in possession of mouza Cuttulpore since 1199 F. S., the lapse of twenty years from that period to the year 1219, the date of the present suit, bars their claim, and places it beyond the cognizance of the Court: even crediting the allegations of Mohun Sahee, Bhooopnarain Sahee, and Birjoo Sahee, that the plaintiffs received in their presence, from the defendants, twenty-five rupees one year, twenty another, and fifteen another, it would not appear that these sums were paid as *malikana*; for if the plaintiffs were entitled to a moiety of eight mouzas, it is surprising that they were satisfied with so small an amount (one mouza alone, Cuttulpore, consisting of seventy beegas, being set apart for that purpose), and that they did not sue, if they considered their share of *malikana* inadequate. None of the plaintiffs witnesses have deposed to their having received *malikana* from 1199 to 1210 F. S. It is surprising that the plaintiffs should be in possession of ten beegas of *malikana* land in mouza Rajkund, as stated by them, for it appears from the depositions of the witnesses, that one hundred beegas of *malikana land*, in a third of mouza Rajkund, is separate; and even if they are in possession, it can only be granted for their support. The grant of indigo, on forty-five beegas of the mouza Rajkund lands (a copy of which has been filed by the plaintiffs, under the idea that the insertion of the name of Joolal Sahee, son of the plaintiff Oudhoo Sahee, in it, in conjunction with the names of certain of the defendants as *maliks*, might benefit his cause) is insufficient to establish their claim, inasmuch as I am of opinion, that such grant was made for their subsistence in the same manner as, according to the statement of the defendants, five beegas of *malikana* land in mouza Rajkund, were granted for their subsistence."—He therefore dismissed the suit with costs.

Oudhoo Sahee and Roopun Sahee (Cheyn Sahee being dead) appealed to the Patna Provincial Court *in forma pauperis*.

On the 23d of April 1821, the Third Judge (in opposition, to the opinion of the First Judge, as contained in his proceeding of the 15th of January 1821, who was disposed to affirm the judgment of the Zillah Court) and in concurrence with the Acting Judge, who considered that it had not been proved, that the respondents ancestor repurchased the villages in dispute, reversed the Register's decree,

and passed a decree directing the appellants to be put in possession of a moiety of the villages in dispute, according to their claim, and granting in like manner to the respondents a moiety of mouza Dostpoor Kundree, which was in the possession of the appellants. The costs of both Courts were made payable by the respondents.

A special appeal to this Court was allowed by the Second and Third Judges (Messrs. Smith and Goad,) on the grounds, that the proprietary right of Oudhoo Sahee, and the other plaintiffs to the estate, did not appear well founded, and because the reasons stated in the decree of the Zillah Court, and the proceeding of the First Judge of the Provincial Court seemed to justify a further investigation of the defendants case. The appellant, Luchmun Sahee, was succeeded on his demise by Birja Sahee, who appeared on behalf of himself and likewise as guardian to Achdnaut Sahee, Hoolee Sahees, Pran Sahees, Thakoordial Sahee, Rughobundial Sahee, and Soodishtdial Sahee, his minor brothers, heirs of the deceased. The respondent, Oudhoo Sahee, was succeeded on his death by Joolal Sahee and Dhunee Sahee his sons, and Ishurdutt Sahee his grandson.

The case came to a hearing before the Second Judge (C. Smith) on the 16th of March 1825, when all the papers and pleadings of the parties were read. Subsequently, the appellants *vakeel* presented a copy of a decree passed by the Durbunga Zillah Court, dated July the 5th, 1782, in the case of Moohummud Shakir Khan v. Luchmun Sahee; copy of a report made in 1196 F. S. on the mouzas in perganna Tirsut; a copy of the *Kitab Minhaee* for 1198 F. S.; and a *pottah* in the names of Luchmun Sahee and others, dated 15th of *Shuhur Showal* 1209 F. S.

After a due consideration of all the circumstances of the case, the Second Judge (C. Smith) saw no reason to change the opinion entertained by him on admitting the special appeal. He therefore recorded his judgment to the following effect :

" I am clearly and decidedly of opinion, that the estate in dispute in perganna Tirsut, zillah Tirhoot, belonged formerly to the ancestors of the parties in this case, but went, and for a long time continued, out of their possession; that the family of Juggut Sahee, son of Deo Singh Rai, viz. the appellants' ancestors, alone exerted themselves and expended money for the recovery of it, and having repurchased it, have ever since been in possession of it, independently and exclusively of the respondents, who are descendants of Behar Sahee, the other son of Deo Singh Rai; that the descendants of Behar Sahee had no part or share in the recovery of it; and that although a portion of land may have been made over to them for their subsistence, such grant cannot establish their proprietary right. It appears from the papers of the case, that when the settlement was made in 1197, the name of Luchmun Sahee (who is one of the descendants of Juggut Sahee) was registered in the Collector's books; and that in 1204 F. S., the names of Soobrun and Pirtee Sahee were also entered; but they were likewise descendants of Juggut Sahee, nor does it appear that the name of any one of the descendants of Behar was ever registered in the Collector's office. The reasons, moreover, stated in the proceeding of the First Judge of the Provincial Court (against whose opinion the decree

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1826. of that Court was passed,) and in the decree of the Register, appear to me correct and conclusive. Adverting to these circumstances, and to the precedent established by the decree No. 2219, Birja Sahee and others, passed by this Court on the 27th of April 1824, which provides v. Roopun that the fact of a person being a sharer in an estate before it is sold, is no ground for granting him a share in it after it is repurchased. I am of opinion, that the decree of the Provincial Court Salhee and others. should be reversed, and the judgment of the Register upheld."

The case was accordingly referred for the concurrence of another Judge, and came to a hearing before the Chief and Fourth Judges (Messrs. Leycester and Dorin) who having perused all the papers, were of opinion, that although the appellants and respondents were collateral relations, and descended from one common ancestor (Deo Singh Rai), who was the proprietor of the villages in dispute, as well as of others, yet it appeared probable, from the evidence adduced, that the villages in question had been alienated, and had been subsequently reacquired, as stated by the appellants, exclusively by them; and, that, at all events, there was no satisfactory proof, that the respondents' branch of the family had ever been in possession of any portion of the lands in dispute, since the accession of the Company to the Dewanny, or sufficient trace of any right to share having been maintained, and kept alive since that period. In concurrence, therefore, with the Second Judge, they passed a decree reversing the judgment of the Provincial Court, affirming the order of the Zillah Court, which dismissed the plaintiffs claim; and making the costs of the Provincial and of that Court payable by the respondents.

SYUD KULUNDUR ALI, Appellant,
versus
 DHOOMUN BEEBEE, (widow of KHODA YAB KHAN, deceased), Jan. 16th.
 and others, Respondents.

SYUD KULUNDUR ALI, having proved his pauperism, instituted this suit *in formā pauperis*, to be allowed to redeem from mortgage a portion of mouza Kuttola, a rent free village, and to recover from the defendants mesne profits from 1228 to 1230 F. S. The action was brought in the Allahabad Zillah Court, where the claim was dismissed. On appeal to the Benares Provincial Court, the *formā pauperis* application to prosecute the appeal *in formā pauperis*, without any reference to the fact as to whether he was or was not a pauper, and without upon the ground that the original judgment did not appear to be erroneous or unjust, and therefore did not merit a further investigation in appeal. He was, at the same time, left at liberty to institute his appeal on performing the conditions of appeal prescribed by the regulations for persons not suing as paupers. He subsequently preferred a special appeal against this order, to the Sudder Dewanny Adawlut, praying that the Provincial Court might be directed to admit his appeal as a pauper. The Second Judge of the Sudder Dewanny Adawlut (C. Smith), before whom the case came to a hearing, rejected the appeal, observing that the Provincial Court did not represent Kulundur Ali as possessing sufficient funds to defray his expences, but refused to admit his appeal *in formā pauperis* on a review of the circumstances of his case, and the order passed thereon by the Zillah Judge, and that it had frequently been determined by the Sudder Dewanny Adawlut, that such an order was final and conclusive, and not open to appeal. (a)

(a) By clause 3, section 12, Regulation 28, 1814, it is provided, that " If upon a perusal of the petition and copy of the decree (in the case of an appeal by a pauper) the original judgment shall not appear to the Court to be erroneous or unjust, or if the nature of the cause shall not appear to be of sufficient importance to merit a further investigation in appeal, the Court will reject the petition and will refuse to admit the petitioner to sue in appeal as a pauper." This rule has been construed by the Sudder Dewanny Adawlut, on many occasions, as vesting the appellate authority with discretion to pass a final order not open to special appeal. It would have been otherwise had the appellate authority rejected the petitioner's appeal, on the ground that he was not a pauper, in which case a special appeal might have been admitted for the purpose of trying that point.

1826.
Jan. 24th.

LUCHMUN POOREE, Appellant,
versus
JOWAHIR GEER, Respondent.

In a suit to obtain possession of certain premises under a deed of *bye-bil-wufa*, the mortgage having been foreclosed, and the sale made absolute; it appearing that one rupee per cent per mensem was the sum stipulated to be paid as interest in the deed of mortgage, but that the mortgagor had received a separate bond engaging the payment of an additional 1 per cent interest, such a proceeding was held to be contrary to the provisions of regulation 17, of 1806, and the claim was accordingly disallowed.

THE respondent brought this action in the Benares City Court, on the 5th of February 1816, against the appellant and Busram Pooree, to recover possession of two dwelling-houses, and some waste land situated in Luchmun Kund, one of the wards of the town of Benares. The suit was laid at 1395 rupees, 1 anna, principal and interest of the deed of mortgage and conditional sale.

The plaintiff set forth that the defendants borrowed Rs. 801, from the plaintiff, at an interest of 1 per cent, and mortgaged to him the premises in dispute under a deed of mortgage and conditional sale, dated 13th of *Mawg* 1217 F. S. (February 2d, 1810) redeemable within four years; that on the expiration of the stipulated period, the plaintiff presented a petition to the Court to be put in possession of the above property, upon which the Judge, in conformity with the rule contained in Regulation 17, of 1806, directed them to be served with a notification, that if they failed to redeem the mortgaged property within one year from the date thereof the mortgage would be finally foreclosed, and the conditional sale made absolute; and that when he petitioned a second time at the end of the year, the Judge declared that he could not be put in possession of the mortgaged property except by a regular suit. He therefore now sued accordingly.

Luchmun Pooree who alone gave in any answer, acknowledged his having executed the mortgage-deed, but denied having received any consideration for it, maintaining that he had been induced to sign the deed by the fraudulent collusion of one Jeswunt Pooree, a connection of the plaintiff's; that the premises at issue were worth no less than 10,000 rupees, and that, although the legal interest of one per cent per mensem was stipulated for in the mortgage-deed, he had been required to sign another bond for an equal amount of interest, on 384 rupees more, it being conditioned that the plaintiff was to be recognized as legal possessor of the house, and that the above sum should be liquidated by the mortgagor paying a monthly rent of eight rupees, that, in point of fact, however, he the defendant, by reason of the non-payment of the mortgage-money, had declared the whole transaction void within two weeks after; as he could bring witnesses to prove.

The City Judge, on the 21st June 1819, finding from the evidence of two witnesses among those called by the plaintiff, that at the time the mortgage-deed was executed, he had exacted another bond of the nature described by the other party, gave judgment, dismissing the claim with costs as directed by section 9, regulation 15, 1793, extended to Benares by section 2, regulation 17, 1806.

The plaintiff having appealed to the Provincial Court, the above decree was reversed by the First and Officiating Judges, on the ground of the silence of the witnesses alluded to with regard to the stipulation of illegal interest until questioned respecting it; and of the conflicting answer then given by them, one having stated

that the additional bond was for double interest, and the other that it was for the sum of 284 rupees, as alleged by the defendant; and further, on the absence of any claim by the plaintiff under that document, which was not even mentioned in the mortgage deed. 1826.
Luchmun Pooree v. Jowahir Geer.

An application by Luchmun Pooree, *in forma pauperis*, for the admission of a special appeal, was laid before the Second Judge of the Sudder Dewanny Adawlut, on the 12th of September 1821. The witnesses in question having attended on behalf of the plaintiff, the City Judge having in his proceedings declared them respectable and trustworthy, and nothing appearing to impugn their testimony, which went to shew that the plaintiff, in the year 1810, A. D. in contravention of regulation 17, 1806, had stipulated for interest at the rate of two *per cent per mensem*, and in order to conceal the true state of the case had taken two separate bonds; Mr. Smith held that a further consideration of the proceedings was called for. The appeal was accordingly allowed, with the concurrence of the Third Judge (S. T. Goad) on the 17th of the ensuing November.

Luchmun Pooree subsequently filed a petition on the prescribed stamped paper, and paid into Court the established pleader's fees, in consequence of notice in a proceeding, bearing date the 21st of April 1825, that his appeal could no longer be heard *in forma pauperis*. (a)

The Second Judge, when the case was brought forward on the 24th of December 1825, observed, that the provisions of section 5, regulation 17, 1806, were clear and peremptory, and that the fact of the execution of the additional bond was unquestionable, and had not been denied by the plaintiff himself when replying to the defendant's plea in the City Court. He therefore recorded his opinion that a decree should be passed confirming the decision of that authority, and reversing the decree of the Court of Appeal.

A final judgment was recorded to that effect, with the concurrence of the Third Judge (C. T. Sealy) it being adjudged that the respondent, who had been placed in possession of the premises at issue, by order of the Provincial Court, should restore them to the appellant, together with mesne profits, and should be liable to all costs of suit.

(a) It having been determined by a majority of the Court, in construction of regulation 28, 1814, that no special appeal *in forma pauperis*, can be admitted in cases originally instituted subsequent to the 1st of February 1815, when that enactment came into operation, but this construction has been superseded by section 5, regulation 2, 1826.

1826.

Jan. 26th.

**KASHEE SURUN CHUKRWURTY, Appellant,
versus
RAMKISHEN GEER, Respondent.**

In an action for debt the borrower pleads repayment and produces receipts on paper stamped six years after the date of their execution. Held that such documents were inadmissible and claim adjudged for this and other reasons.

THIS was a suit instituted by the appellant against the respondent in the Mymunsingh Zillah Court, on the 11th of September, 1819, for the recovery of Rs. 4,000. principal and interest of a bond.

The plaintiff set forth that the defendant borrowed Rs. 2,000, from the plaintiff, for which he executed and gave him two bonds, on the 7th of *Bysakh* 1217, B. S.; that as the defendant had failed to discharge the debt on the expiration of the period stipulated in the bonds; and as the interest from the date of their execution to the institution of the present suit would, if calculated at the rate of 12 per cent per annum, be found to exceed the principal, the plaintiff, in conformity to the regulations, now sued for the principal, and an equal sum as interest.

The defendant in reply, alledged that he did not recollect whether he had given the plaintiff one or two bonds, but stated that he had, on one occasion, in the month of *Bysakh*, paid to the plaintiff's *Naib* Rs. 1,700, and on another, Rs. 220 (out of Rs. 300 borrowed from Talewar Singh,) in satisfaction of the plaintiff's demands, and could produce receipts signed by the *Naib*, as well as the plaintiff's letters; that as the plaintiff had not returned the bond, although frequently requested to do so, he (the defendant) had not discharged the balance of his debt, and that the present suit, instituted by the plaintiff, after a lapse of ten years, without deducting the amount repaid to him was altogether unjust.

The Zillah Judge considered that the papers of the case, and particularly the defendant's reply, had clearly established the fact of his having borrowed the money and executed a bond for the amount; but he was of opinion, that the defendant had not substantiated his plea of having paid Rs. 1,920 through the plaintiff's *Naib*, who gave him receipts. There appeared to him strong grounds for doubting the testimony of the witnesses adduced by the defendant, who, it seemed, were connected with him; inasmuch as they had, notwithstanding the long period that had elapsed, deposed circumstantially and minutely to the defendant's having paid the above sum to Roopgeer, the plaintiff's *Naib*, and because the evidence of Ram Mohun Ghose and Gunga Churn Mitter (two of the defendant's witnesses) had been already rejected by the Court, as unworthy of credit in the case of Roopgeer Suniajee and others, appellants, versus Gowrchunder Fotadar, respondent. If the defendant had really, as he alledged, paid the above sum, he would undoubtedly have either recovered the bond, have made the plaintiff write a receipt on the back of it, or would have required him to furnish a separate receipt. But the defendant, who was the grandson of Roopgeer's *chela*, could have found no difficulty in procuring a false receipt from him. He therefore passed a decree on the 14th of September 1820, in favour of the plaintiff, directing the defendant to pay him Rs. 4,000, the amount of his claim, with costs.

The defendant appealed to the Dacca Provincial Court. On 1826.
the 19th of April 1821, the First and Second Judges passed a decree to the following effect:

"It appears from the proceedings of the case, that the execution of the bonds is admitted. The only point of dispute is the payment of Rs. 1,920, affirmed by the appellant, and denied by the respondent. As it is clear (from two drafts signed by the respondent and three receipts signed by Roopgeer Suniasee, one for Rs. 1,700, another for Rs. 120, and another for Rs. 100, which were originally on unstamped paper, but were subsequently stamped, and the authenticity of which has been proved by the witnesses adduced by the appellant) that Roopgeer, the plaintiff's *Naib*, received from the appellant the sum of Rs. 1,920, in payment of plaintiff's demand, and gave him receipts for the amount, these receipts are perfectly admissible and their amount must be credited to the appellant. The allegations of the respondent relative to the appellant having suborned witnesses, are altogether incredible, for their depositions do not exhibit the slightest mark of collusion; on the contrary, the manner in which they have given evidence proves the truth of their statements. The Court have every reason to believe that the respondent received, at the expiration of the period specified in the bonds, the sums mentioned in the above receipts by drafts on his *Naib*, and has brought this action against the appellant, in consequence of some quarrel between them; otherwise, it is hardly possible that he would have refrained from suing for nine years, when the period stipulated in the bond for the repayment of the debt was very short." They therefore amended the judgment of the Zillah Court, by directing the sum of Rs. 1,920 • to be deducted from Rs. 2,000, the amount of the bond, and the respondent to pay Rs. 80, the balance of the principal, and Rs. 80 interest. The costs of both Courts were made payable by the parties proportionally to the award.

The appellant being dissatisfied with this decision, presented a petition for a special appeal to this Court. The Second and Fourth Judges (C. Smith and J. Shakespear) being of opinion that a collusion existed between Roopgeer and Ramkishen Geer, who stood to each other in the relation of *Gobroo* and *Chela* respectively, and therefore had a common interest, and finding from a decree of the Dacca Provincial Court, dated February 9th, 1814, that Roopgeer had, on a former occasion, filed a forged *ikrarnama*, and, adverting moreover to the fact of no receipt being endorsed on the bonds, as well as to the other circumstances noticed in the Zillah Court's decree, considered a further investigation of the case necessary, and therefore authorized the admission of a special appeal.

The case accordingly came to a hearing before the Second Judge (C. Smith), on the 7th of May 1825. The following exhibits were subsequently filed by the respondent's *vakeel*; copy of a decree passed by the Mymunsingh Zillah Court, in the case of Kashee Surun Surma, appellant, *versus* Ram Mohun Sein, respondent, on the 2d of August 1821; copy of a notification issued from the Zillah Cutcherry, dated 12th December 1820; and copy of an *arzee* from Moohummud Uzzeez Kazee, *Moonzif* at the Mudhoopgor

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1826. *Kashee Surun Chukr-wuryt, v. Ramkishen Geer.* Thana. The Second Judge, having duly considered all the proceedings in the case, was of opinion, that the papers numbered 24, 25, 26, 27, and 29, which had been filed by Ramkishen Geer, in the Provincial Court, did not affect the present case, and were inadmissible, inasmuch as no regulation had been passed since the enactment of section 9, regulation 1, 1814, which authorized a Collector to stamp a document six years subsequent to its execution; that no credit could be attached to the testimony of the respondent's witnesses, as it was clear, if so large a sum as Rs. 1,920 had really been paid by the respondent, the receipts, &c. would, like the bond, have been on stamped paper; that the fraudulent disposition and collusion of Roopgee were evident from the decree of the Dacca Provincial Court, dated February 9th, 1814; and that he saw no reason for altering the opinion he had formed on admitting the special appeal. He therefore thought the decree of the Provincial Court should be reversed, and the decision of the Zillah Judge affirmed.

The case was accordingly laid before a second Judge, for his concurrence, and the case came to a hearing before the Third Judge (C. T. Seal), who expressed his opinion to the following effect: "The appellant sued to recover Rs. 2,000 principal, advanced to the respondent (for which the latter had executed two bonds) and a like sum as interest thereon. The respondent admitted his having contracted the debt, but stated that he had honored the appellant's drafts to the amount of Rs. 1,920, which he had paid to his Naib, Roopgee, who had given receipts for the same. These receipts he produced, and called witnesses to support his allegations in the Zillah Court. The Judge rejected the receipts produced by the respondent in consequence of their being on unstamped paper, and, considering his witnesses undeserving of credit, passed a decree in favour of the plaintiff. The respondent appealed to the Dacca Provincial Court, where he filed these same receipts, which he had caused to be stamped six years after their execution. The Provincial Court considering the receipts valid and admissible, ordered the respondent to pay the appellant Rs. 80, the balance of the principal, and the same amount as interest, total Rs. 160. The evidence of the witnesses adduced by the respondent, appears, however, to be unworthy of credit. For it is the usage of the country to restore the bond on the whole amount of the debt being paid, and if only a portion of it has been liquidated, to endorse a receipt for such portion on the bond. If the respondent had really paid the sum of Rs. 1,920, he would have taken back one of the bonds which were for Rs. 1,000 each, and have caused a receipt for the rest of the money paid to be endorsed on the other. As this had not been done, if the Court were to admit and sanction receipts of this nature, which were originally on unstamped paper, and were not stamped till six years after they were executed, there would be an end to all security in pecuniary transactions. Besides, Roopgee is the respondent's chela, and could therefore have easily obtained the receipts from him." For these reasons, the Third Judge concurred with the Second, in upholding the decree of the Zillah Judge. The respondent was ordered to pay to the appellant the amount of

his claim with interest thereon, from the date of the Zillah Court's decree till payment should be made. The costs of all three Courts were made payable by the respondent.

RAMKOOMAR NEAEE BACHUSPUTEE, Appellant,

versus

BHUGWUTEE DIBIA, (widow of RAMDHUN BHUTTACHARAJ,) and others, Respondents.

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Jan. 31st.

THIS was a suit instituted in the Calcutta Provincial Court, on the 12th of July 1817, against the appellant, by Ramdhun Bhuttacharaj, on behalf of himself and as the representative of Neelmunee Bhuttacharaj, Ramkishub Bhuttacharaj, and Sheochunder Bhuttacharaj, minors, heirs of the late Puddum Lochun Bhuttacharaj, to recover possession of 44 batees, 10 bans, of rent-free land, situated in Holaparah and Bahirchura, Ram Jeewun Chuk, pergunnah Durodumna, zillah Midnapore. The action was laid at its. 13,200, being eighteen times the annual produce and mesne profits from 1,220 to 1223, B. S.

The plaint set forth, that 12 batees and 10 bans of Burhmootter land, in Holaparah, and 35 batees of land in Bahirchura, Ram Jeewun Chuk, pergunnah Durodumna, constituted the defendant's ancestral estate; that he disposed of 3 batees by gift to certain persons, and sold the remainder of the lands, now in dispute, under a *bye-bil-wufa*, or deed of mortgage and conditional sale, to the plaintiff's father, Puddum Lochun Bhuttacharaj, on the 9th of Assin, 1214, B. S. in consideration of the sum of Rs. 5,001; that he executed and signed a deed of sale and receipts, which were regularly attested by witnesses, received the purchase money, and deposited the deeds under which the tenure was held rent-free with the plaintiff's father, who gave him an *ikrarnama*, or agreement promising to restore the deed of sale and other documents affixed thereto, on condition that the sum specified in the deed of sale was paid on or before the 9th of Assin, 1219, B. S.; that the defendant farmed the lands in dispute of the plaintiff's father, under the substituted name of Ram Gopal Turkalunkar (his sister's son) at a *jumma* of Rs. 600, the amount of the annual interest, till 1219, B. S., and paid him the sum specified in the lease as interest on the principal sum specified in the deed of sale; that as the defendant failed within the period specified in the agreement to liquidate the principal of the purchase mbaey, and at the commencement of 1220, B. S. ousted the plaintiff's father from the lands, he made an application to the Judge of Zillah Midnapore, according to section 8, regulation 17, of 1806, who served the defendant with the usual notification for the period of one year; that at the expiration of that term the defendant presented a petition to the Court, full of idle and trifling excuses; that the plaintiff's father again applied to the Zillah Court to be put in

The validity of a transaction of *bye-bil-wufa* is not affected by the fact of the parties not having come to a final adjustment of their respective accounts previous to the execution of the deed by the conditional seller; neither is it affected (the term at the end of which the conditional sale was to be come conclusive being five years) by the fact of an excess above the legal interest having been received by the conditional purchaser in any one year; there being no trace of fraud to elude the law regarding interest.

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possession of the lands in dispute, and was referred to a civil suit on the 18th of November 1806, in conformity to the orders of the Sudder Dewanny Adawlut. The plaint proceeded to state, that as the plaintiff's father had died in *Aghun* 1222, having previously executed a regularly attested will, in which he nominated the plaintiff guardian of his minor brothers, with the consent of his son Neelmunnee and of his second wife; and as the purchase money had not been repaid by the defendant, in conformity to the agreement, or in obedience to the notification of the Court, and thereby according to the provisions of the regulation above cited, the mortgage was foreclosed and the sale made conclusive, the plaintiff now sued to recover possession of the lands to which they were entitled, on his own behalf, and as guardian to his minor brothers.

The defendant in reply, stated, that the plaintiff's father made repeated applications to her for the payment of the expences incurred by him in the performance of her father's *saddha* with exorbitant interest, but she resisted his demands on the ground that she had never been furnished with accounts of *jumma* and *khurch*, specifying the dates of each receipt and disbursement. In consequence of this, the plaintiff's father sent her an account for Rs. 5,001, containing an item of Rs. 41. 6. 6. as interest in advance, and promised to furnish a particular account of receipts and disbursements with dates, on payment of the above sum. In lieu of this amount, she made over to him a deed of sale for the lands in dispute, with a receipt for the money, and in return received from him an *ikrarnoma*, or agreement, by which he pledged himself to restore the deed of sale and the other documents, provided the above principal was repaid with interest within five years. The plaintiff's father continued in possession of the lands in dispute, as farmer, till 1219, B. S. and appropriated all the profits realized therefrom, having previously received from her a *pottah* under the assumed name of his sister's son. As the annual proceeds of the lands in question amount to Rs. 1,400, the plaintiff's father must have realized from 1214 to 1219, B. S. a period of six years, upwards of Rs. 8,400. Besides this, she had deposited in his charge various sums of money for domestic purposes, and had never got a receipt. The claim now preferred by the plaintiff, notwithstanding it appeared from the *wasilaut* papers, that, after paying the principal and interest due to the plaintiff's father, there remained a balance in her favour of upwards of Rs. 1,000, in violation of his father's agreement, and without furnishing accounts of receipts and disbursements, with dates, and settling the *wasilaut* accounts, was altogether fraudulent and unjust. She further maintained, that according to the provisions of regulation 15, of 1793, the principal was not recoverable in consequence of the interest in advance having been incorporated with it, and that the sums realized by the plaintiff, would appear from the *wasilaut* papers and the evidence of witnesses, or, in case of any doubt, by calling on the plaintiff to give an account of the *wasilaut*, and appointing a trustworthy person in the capacity of *aumeen*, for the purpose of making a local investigation.

On the 17th of November 1821, the First and Third Judges of the Provincial Court, passed a decree to the following effect:

It appears from the pleadings of the parties, and all the circumstances of the case, that the defendant admits having executed and given a deed of sale for the lands in dispute for the sum of Rs. 5,001 to the plaintiff's father, on the 9th of Assin, 1214, B. S. and to have received from him an *ikrarnama*, agreeing to restore the deed of sale and receipt to the defendant, provided the principal was liquidated with interest within five years. The Court, however, cannot be satisfied with the allegation made by the defendant for the purpose of invalidating the claim respecting the incorporation with the principal of an item of Rs. 41. 6. 6. as interest in advance, which item is introduced into the Bengalee account of receipts and disbursements produced by the defendant, with this remark "the interest is calculated in advance and incorporated with the amount of the *kubala*." For it appears from the evidence of Neelkaunt Holdar, Ram Jye Nyayalunkar and Sheoram, witnesses called by the parties as present at the execution of the deed of sale for the lands in dispute, that the above item was debited to the defendant, when the parties made up their accounts, as part of interest due to the plaintiff's father on a former loan of upwards of Rs. 700, and it was mutually agreed that, after having inspected each other's accounts, which were at their respective houses, they should come to a settlement about the remainder of the interest due to the plaintiff's father, as well as the interest due to the defendant on the sum paid in by him. The defendant has failed to substantiate the other plea, namely, that the plaintiff's father actually farmed the lands in dispute under the assumed name of Ram Gopal Turkalunkar, and appropriated the entire profits realized therefrom till 1219 B. S. and consequently that there would be found a balance in the defendant's favour after deducting the principal with interest. For, from the testimony of Ram Gopal, a farmer, the son of the defendant's sister, a witness called by the plaintiff, and of Neelkaunt Holdar, summoned as a witness by both parties, and who is likewise the surety of the above named individual, it would not appear that the plaintiff's father realized more than an interest of Rs. 600 per annum, till 1219 B. S. which is less than one per cent per mensem on the purchase money. By the testimony, moreover, of several witnesses adduced by the plaintiff, it appears that the defendant disposed of the crops produced on the land in dispute, and the defendant has not brought forward any proof to show that the plaintiff's father was in exclusive possession of the lands. For this reason, and as the defendants failed to pay the principal with interest to the plaintiff's father within the period prescribed, although served with a notification from the Court, the plaintiff is entitled to possession of the lands in dispute in right of a purchase now become conclusive. A decree was accordingly passed in favour of the plaintiff, awarding him possession of 44 batees, 10 bans of land as described in the deed of sale, with mesne profits at the rate of Rs. 600 per annum, from 1220 to 1223, amounting in four years to Rs. 2,400, as stated in the plaint, and making the costs payable by the defendant. In carrying this decree into execution, the Zillah Judge was directed to ascertain and make the defendant pay to

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Ramkoomar Neace Bachanputee, v. Bhugwutes Dibia and others. The appellant being dissatisfied with the foregoing decision, preferred a regular appeal to this Court. In consequence of a notification issued by the Court, Ramkisub Bhugwutes Dibia, widow of Ramdhun Bhattacharaj, as guardian of Chunder Keyt, a minor son of her deceased husband, and Sreemuttee Dibia, as mother and guardian of Sheochunder a minor, appeared to answer the appeal.

The case came to a hearing before the Second Judge (C. Smith), on the 3d of January 1825, who recorded his opinion to the following effect:

"The present cause was originally brought before me on the 8th of December 1824, and having been partly gone through was deferred for further consideration. It has come a second time before me this day, and, after a perusal of all the papers of the case, I am of opinion that the appellant's plea relative to the farm in the name of Ram Gopal Turkalunkar (appellant's own sister's son) is altogether unfounded. But that no adjustment of accounts to the amount of Rs. 5,001, the principal of the *bye-bil-wufa* transaction, had taken place up to the 9th of Assin 1214, B. S. when the *kubala* was executed, is evident from the testimony of the witnesses and from accounts of the above date. From the evidence of Neelkaunt Holdar, a witness approved by both parties, it likewise appears that the plaintiff's father received, in 1214 B. S. from Ram Gopal, Rs. 396, and in 1215 B. S. Rs. 804, altogether Rs. 1,200, and that there was due to the plaintiff's father for 1214 B. S. from 9th Assin (the date of the deed of sale) to the end of *Cheyt*, Rs. 335, and for 1215 B. S. Rs. 600, altogether Rs. 935. The surplus Rs. 265, paid above the interest, must be carried to the respondent's credit, and deducted from the principal, and the appellant be made liable for Rs. 4,950 9. 14. the amount of the accounts adjusted at the time of the *kubala*. And I am of opinion, that the fact of a nonadjustment of accounts in a case of conditional sale, a transaction in which it is necessary that the accounts should be correct and complete, is sufficient to nullify the claim to an absolute sale. The settlement of accounts which was neglected to be made on the 9th of Assin 1214, B. S. was not completed at any subsequent period, for the parties did not meet as they had agreed, for the purpose of coming to a settlement about the disputed sum of Rs. 41. 6. 6. I am of opinion therefore that the appellant is liable for Rs. 4,694. 9. 14. with interest from 1220 B. S. that the decree of the Provincial Court should be amended, and the mortgaged estate in question, which has apparently come into the respondent's possession in consequence of the Provincial Court's judgment, should be restored to the appellant, and in the event of his failing to pay the above principal, with interest, should be sold with his other property. The papers of the case were accordingly ordered to be laid before another Judge for his concurrence in the following decision, viz. "That the decree of the Provincial Court, dated November 17th, 1821; be amended; the claim to a conclusive sale of the above estate dismissed; that the appellant be made to pay to the respondent the amount

of his debt, viz. Rs. 4,694. 9. 14. principal, and a like sum for interest, altogether Rs. 9,388. 9. 14. with further interest from the date of the decree until payment shall be made; that the Ramkoo^m costs be charged to the appellant; that the mortgaged estate ^{mar Nees} which has come into the respondent's possession in consequence ^{Bachus-} of the decree of the Provincial Court be restored to the appellant; ^{putee, v.} and, as from the commencement of 1220 B. S. the respondents ^{Bhngwut} Dibis and have only received interest for 8 years and 4 months, and not for others. 11 years and 10 months, that they be not required to furnish ^{wasilaut} accounts; and that if the appellant fail to pay the above sum with costs, that the mortgaged estate and the appellant's other property be sold to realize it."

Kishen Kinker Turca Bhoshun filed a petition in this Court as a third party, setting forth his interest in the present cause, and that he was the appellant's own brother. Subsequently this case came to a hearing, on the 11th and 12th of July in the same year before the Third Judge (C. T. Sealy) who, after a perusal of all the papers, recorded his judgment in the following terms:

"After a consideration of all the papers and circumstances of the present case, it appears that the appellant Ramkoomar Nees Bachusputee (originally the defendant) sold the lands in dispute to the plaintiff's father for the sum of Rs. 5,001, on the 9th of Assin 1214, B. S.; and received from him on the same day an *iskrarnama*, by which, provided the above purchase money was repaid by the defendant on or before the 9th of Assin 1219, B. S., the plaintiff's father agreed to restore to the defendant the deed of sale, as well as the other documents affixed thereto. As, however, the above condition was never fulfilled, and the prescribed period elapsed, the plaintiff's father preferred a petition to the Court, in conformity to regulation 17, 1806, and the Court according to the provisions of that regulation, issued a notification to the defendant, informing him, that if he did not repay the purchase money of the mortgage and conditional sale within the period of one year, the sale of the lands in dispute would be made conclusive. The defendant, however, neglected to pay the money within that period. The defendant's allegation, moreover, with regard to Rs. 41. 6. 6. being interest in advance, is evidently a mere fabrication. For, at the time when the deed of sale was executed, in consequence of the purchase money being deficient by that sum, the plaintiff's father brought forward a claim to upwards of Rs. 700, due to him on a former account. The defendant admitted this claim, but demanded the sum of Rs. 500 already paid by him to the plaintiff's father as interest. As, however, no accounts were forthcoming, which furnished the dates of the dealings between the parties, it was agreed mutually that they should go to Bhatparah and compare the accounts, and that the balance should be paid to which ever party it should be found to be due, and a deed of sale for Rs. 5,001, was executed with the consent and approbation of the defendant. It does not appear from the allegations of the parties, that the plaintiff's father had any intention of defrauding, or evading the regulation, or whether the above item was really interest in advance or not. On the other hand, it has been clearly established by the depositions of witnesses, that the above sum

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was taken as a former balance, and the deed of sale executed; and it is evident, that as long as no fraud or deceit is discovered in a *bye-bil-wufa* transaction, its validity is recognized by the regulations, and cannot be set aside. For these reasons I am of opinion that, according to regulation 17, of 1806, there can be no doubt relative to the sale of the lands in dispute being absolute and conclusive. And, although it is probable that the parties had, according to the agreement, come to a settlement relative to the sum of Rs. 41. 6. 6. yet as this has not been clearly proved by the existing documents, and it appears that the plaintiff's father did, from the 9th of *Assin* till the end of *Cheyt* 1214, B. S. and in 1215 B. S. receive, above the interest to which he was entitled, the sum of Rs. 264. 8, I am of opinion that both these sums, viz. Rs. 41. 6. 6. and Rs. 264. 8. altogether Rs. 305. 14. 6. should be deducted from the mesne profits awarded to the plaintiff by the decree of the Provincial Court, and given to the appellant, as his right; and that with these alterations and amendments the decree of the lower Court should be confirmed in its other points, and all costs be made payable by the appellant." In consequence of this difference of opinion, the papers of the case were ordered to be laid before a Third Judge. The *Vakeels* of the parties having attended, the case, in conformity with the order of the 12th of July 1826, was brought before the First and Fourth Judges (W. Leycester and W. Dorin) on the 3rd, 10th, and 16th of January 1826, when all the papers filed in the Provincial Court having been read, as well as the grounds of appeal and the reply thereto, and the opinions of the Second and Third Judges recorded in their proceedings of the 3rd of January and 12th of July 1825, and the petition of Kishen Kinker Turca Bhoshun, a third party, the case was deferred for further consideration, and came to a hearing again on the 31st of January 1826, when judgment was passed to the following effect:

"We are of opinion, with respect to the item of Rs. 41. 6. 6. mentioned in the defendant's (present appellant's) reply, that there is no evidence of any fraud or deceit with intent to evade the provisions of regulation 15, of 1793, so as to come under its penalty; nor does there appear any trace of the illegal composition of the other parts of the 5,000 Rs. for which the *Kubala* was given. With respect to the balance stated by the appellant to be due to him, it is inferrible from the evidence of impartial witnesses, that the sum realized by the mortgagee was 600 Rs. *per annum* (which was the legal interest) except that in the second year there was an excess of Rs. 264. It is presumable, also, that the mortgagor was virtually in possession, and as the principal of the deed of sale with interest at the rate of 12 *per cent per annum*, was not paid or deposited in the treasury of the Court within the period specified in the deed of sale, or subsequently in one year, the period allowed by the regulation (due notice having been given after the expiration of the stipulated period as required by the regulations), the title of the seller of the lands in dispute has undoubtedly ceased, and the conditional sale has become conclusive. For these reasons, therefore, we concur in the judgment of the Provincial Court, dated November 17th, 1821, except-

ing such part of it as refers to the sum of Rs. 264, which must be deducted from the accounts in favour of the appellant (original defendant)." A decree was accordingly passed, with the foregoing exception, affirming the judgment of the Calcutta Provincial Court of the above date, which decreed the claim to the lands in dispute with mesne profits from the year 1224 B. S. till the respondents should obtain possession; and as it appeared that the Dibia and respondents had obtained possession of the lands in dispute under others. Ramkoo-mar Nees Bachus-putee, v. Bhugwutes the decree of the Provincial Court, it was provided by this decree that Rs. 264 should be deducted from Rs. 2,400, the amount of mesne profits specified in the Provincial Court's decree, and the balance of Rs. 2,136 should be paid by the appellant to the respondent, together with mesne profits for the lands in dispute for 1224 B. S. till possession was restored. All the costs of the Court were made payable by the appellant.

RAMCHUNDER SURMA, Appellant,

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versus

GUNGAGOVIND BUNHOOJIAH, Respondent.

Feb. 1st.

THE respondent brought this action in the Dinagepoor Zillah Court, on the 16th of March 1816, against the appellant and others, to recover possession, with mesne profits, of Bungdurrah and four other villages, and a portion (15 anna, 4 gunda share) of another village, being part of a 5 anna share in a zemindaree in Kismut Pergunna Chowra, Zillah Dinagepoor. The suit was laid at Rs. 936. 3. 3. three times the annual amount of assessment.

The plaint set forth that Bungdurrah, &c., seven entire villages, and a 15 anna 4 gunda share of another, constituted a fifth part of the zemindaree Kismut Pergunna Chowra, and were assessed at Rs. 368. 9. 11; that the plaintiff's half-brother Prannath Rai gave to one Radhanath Bunhoojiah, with the plaintiff's consent, Deegha and Furadpoor, two of the above seven villages, subject to a *jumma* of Rs. 56. 8. 10. for the use of an idol named Isr Gopal Deo Thakoor (which was placed in Rataparah, the village in which the plaintiff resided with his stepbrother, and half-brother) and retained possession of the remaining villages, which are the object of the present suit. for the period of his life; that on the death of the plaintiff's brother in the year 1217 B. S. his widow Adiah Mye Dibia registered her name in the Collector's office as proprietor of the villages in dispute, without the plaintiff's knowledge, and on his remonstrating and opposing the measure, she told him that the registry of her name during her life for the villages in dispute, the profits of which would afford her a means of subsistence and serve to defray her exequial expences, would not in the slightest degree affect his rights, inasmuch as he was the sole and undoubted heir to herself and her late husband; that he would certainly succeed her in the property eventually, and her husband.

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band, without children, goes, at her death, to her husband's half-brother, to the exclusion of his maternal grandfather's brother's grand-children.

would, in the interim, be entrusted with the management of all matters relating to the estate; that the plaintiff was satisfied by these assurances, and went to reside in another village, but was incapacitated by illness from superintending the estate, and returned in 1221 B. S. on hearing of the death of Mussummaut Adiah Mye Dibia, and performed the usual exequial ceremonies for her; that Jankeenath Rai, however, and the other defendants, refused to relinquish possession of the villages in dispute, on the plea of their having purchased a 7 anna share, and Ramchunder, on the plea that Mussummaut Adiah Mye Dibia had made a gift to him of a 9 anna share. The plaint proceeded to state, that as Mussummaut Adiah Mye Dibia was a widow and had no children, she was not empowered by the *Shasters* to alienate the villages in dispute by gift or sale: that as the plaintiff and his deceased brother were descended from the same father and grandfather, the plaintiff was alone entitled to offer the funeral oblations on his death, to be his heir, and to lay claim to the estate in dispute, and that he had only delayed to sue in consequence of his inability to defray the legal expences. These were the grounds of the action.

Jankeenath Rai and the other defendants, stated in answer, that the villages in dispute did not constitute the plaintiff's hereditary estate; that the maternal grandfathers of the plaintiff and of Prannath Rai were different and distinct individuals; that Prannath Rai derived the estate in question from his maternal grandfather (being his daughter's son) was in sole and uninterrupted possession during his life, paid the government revenue, and died in 1217 B. S.; that on his death his widow Mussummaut Adiah Mye Dibia, (in consequence of Bhugwutee Churn Rai having obtained forcible possession of the estate, collected part of the rents, and being about to register his name in the Collector's office) was reduced to great distress, and finding it difficult to defray the expences of his *sraddha*, to pay her husband's debts, and to procure subsistence for herself, made a proposal through the plaintiff to Jankeenath Rai and Kownla Kaunt Rai (the father of the other defendants) to sell them a 7 anna share; that at the request of the above named individuals, Mussummaut Adiah Mye Dibia and her brother Ramchunder came with the plaintiff in 1218 B. S., when she received in cash Rs. 1.500 (the sum she had fixed as the price of the 7 anna share) with which she paid the expences of the *sraddha* and her husband's debts, and obtained the means of subsistence, executing and giving to them in return, a deed of a sale, signed voluntarily by herself, and put them in possession of the purchased portion. Had the plaintiff possessed any claim or title to the villages in dispute, he would either have registered his name in conjunction with Prannath Rai as proprietor, or would have opposed the registry of Adiah Mye Dibia's name on her husband's death, or her sale of the 7 anna share. The defendants further maintained, that the *Shasters* permitted Adiah Mye Dibia to sell the 7 anna portion for the purpose of defraying the expences incurred in the performance of her husband's exequial rites, of paying his debts, and of procuring subsistence for herself, and that the plaintiff had unjustly instituted the present

suit at the instigation of Bhugwutee Churn Rai, who, on the death of Prannath Rai, had fabricated a deed of gift for the mouzas Deegha and Furadpoor (being part of a 1 anna share of Ramchunder the zemindaree) in favour of one Radhanath Rai Mookurjiah, from whom he subsequently obtained a deed of sale in his own favour under the fictitious name of Rajkishwar Chowdree his maternal uncle, had it registered, paid himself the expences in order to obtain possession, and had caused him (Radhanath Rai Mookurjiah) to sue them (the defendants) with the view to deprive them of their rights.

Ramchunder Bunboojiah filed an answer to the following effect:

The plaintiff has no claim or title to the estate in dispute, which descended to Prannath Rai from his maternal grandfather, as his daughter's son. The plaintiff is in possession and enjoyment of his ancestral estate, and has not given Prannath Rai a share in it. The ancestral estate and property of Prannath has not been divided. The plaintiff did not perform the *sraddha* or other funeral ceremonies on the death of Prannath. But Mussummaut Adiah Mye Dibia, his (defendant's) sister and the widow of Prannath, who was the person entitled to perform the *sraddha* and other exequial rites on her husband's death, and to succeed to his estate, gave him (defendant) a 9 anna share of the zemindaree in dispute, for the support of herself and the spiritual benefit of her husband, and vested him with power to perform the *sraddha*, &c. To prove these his allegations he (defendant) could produce the deed of gift signed by Mussummaut Adiah Mye Dibia, and bearing the register's signature. Accordingly, on the death of his sister in 1221 B. S. he performed her funeral rites with the customary ceremonies, in conformity to her request, and had, from the date of the deed of gift, been in possession and continued to pay the revenue of the share which he had received in gift. Adiah Mye Dibia was permitted by the *Shasters* to make such a disposal of her property to him, and the plaintiff had unjustly instituted the present suit at the suggestions of Bhugwutee Churn Rai.

The plaintiff, in replication, denied that he ever proposed, on the part of Adiah Mye Dibia, the sale of the 7 anna share, or that she accompanied him, as alleged by the defendants, and stated that as the proceeds of the estate in dispute were very considerable, the *Shasters* did not empower her to alienate the whole of it by sale or gift: she was only permitted to give or sell a few beegas of land for the spiritual benefit of her husband.

On the 17th of August 1820, the Zillah Judge finding from the *vyuvustha* submitted by the Pundit in reply to the interrogatories of the Court, that the sale made by Adiah Mye Dibia, widow of Prannath Rai, of a 7 anna share of her late husband's estate, was valid, but that the gift of the 9 anna share was illegal, passed a decree awarding to the plaintiff possession of the 9 anna portion, which the defendant, Ram Chunder, was directed to relinquish. The plaintiff's costs were made payable by Ramchunder, and those of Jankeanath Rai and the other defendants, by the plaintiff.

Ramchunder appealed to the Moorshedabad Provincial Court against this decision. On the 23d of June 1821, the Fourth Judge, concurring in the decision of the Zillah Court which annulled the

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gift made to the appellant of the 9 anna share in dispute, dismissed the appeal and affirmed the decree of the Zillah Court. The costs of appeal were made payable by the appellant. The appellant, still dissatisfied, presented a petition for a special appeal to the Sudder Dewanny Adawlut, which was admitted by the Second and Third Judges, on the ground that the defendants, in the Dinagepoor Zillah Court, had stated that the maternal grandfathers of Prannath Bunhoojiah (the late husband of Mussummaut Adiah Mye Dibia) and Gungagovind Bunhoojiah were distinct and different persons. In such a case, Gungagovind would not be entitled to succeed to Prannath's property, and Adiah Mye Dibia would retain the power to alienate it by sale or gift. This point not having been thoroughly and satisfactorily investigated in the lower Courts, it was deemed advisable to allow a further consideration of the case. It accordingly came to a hearing before the Second Judge (C. Smith) on the 29th of June 1825, who recorded his judgment on the 5th of July. The following is the tenor of the *vyavvushta* submitted by the Pundits in reply to the questions propounded by the Court.

Answer I.—If a Brahmin resident in Bengal succeeds to and obtains possession of his mother's estate, and dies leaving a widow and half-brother, and if such estate was enjoyed by his mother as *stridhun*, or as a paternal inheritance, in either case, such estate having devolved on him hereditarily, must on his death descend to his heirs, and will consequently go to his widow to the exclusion of his half-brother during her life time. Authorities; Text of *Yajnyawalkya*, cited in the *Daya Bhaga*, and other works: "The wife and the daughters, both parents, brothers likewise, and their sons, &c."

Answer II.—On the death of the widow, the property will descend to her late husband's half-brother in default of a daughter, daughter's son, father, mother, or uterine brother. Authorities; I. Text of *Yajnyawalkya* as cited above. II. The *Daya Bhaga* and other works: "The meaning is, that the whole brother shall inherit in the first place, but, if there be none, then the half-brother."

Answer III.—One half-brother is allowed by the *Shasters* to succeed to the property of another half-brother, although they may be descended from different maternal grandfathers. The authorities cited in support of the two former answers are also applicable to this.

Answer IV.—A widow having succeeded to the property of her deceased husband, has the power of alienating by sale so much of such property (and no more) as may be necessary for the payment of debts contracted by him, for the support of his family, for her own subsistence, for the support of her husband's family, and for the performance of his exequial rites. She may likewise make a gift proportioned to the extent of her late husband's property for the benefit of his soul. And, if these objects (viz. payment of debts, expences of *sraddha*, &c.) cannot be effected without the sale of all the property, she has the power of disposing of the whole of it. But she is not permitted to alienate by gift or sale, the whole, or even a part of the property, solely at the suggestion of her own will and pleasure. Authorities; I. The text

of *Nareda* cited in the *Vivada Bhungarnuva* and other works : 1826.
 "If a wife be thus addressed by her lord at the point of death, or just before a long journey, " such a debt must be paid by thee," she must pay it, however unwilling, if assets were left in her hands." II. The *Vivada Bhungarnuva* and other works, "If the assets of the husband have been received by his wife, she must pay the debt, " however unwilling;" that is, even though she do not promise to pay it. But if the wife, so instructed by her husband at the point of death, in these words, "my debt must be paid by thee" do promise to discharge it, she must then pay it, even though assets were not left in her hands." III. The *Daya Bhaga*, "Even a gift or other alienation is permitted for the completion of her husband's funeral rites." IV. The *Daya Bhaga*, "Hence, if she be unable to subsist otherwise, she is authorized to mortgage the property; or, if still unable, she may sell or otherwise alien it: for the same reason is equally applicable." V. Text of *Yajnyawalcya* cited in the *Vivada*, &c. "He who has received the estate of a proprietor, leaving no son capable of business, must pay the debts of the estate," and, "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth." The text of *Bharata*, "The term "waste" intends a widow's incompetency to alienate her husband's property at her pleasure by gift or sale." The *Daya Ruhasya*.

Answer V.—The grandfather's property (by question I.) having devolved on his daughter's son, and on his death on his widow, such property will, on the widow's demise, descend to his half-brother, to the exclusion of his maternal grandfather's brother's grandchildren, who appear, from the tenor of the question, to be alive.

This *vyuvustha* is founded on the *Daya Bhaga*, *Daya Tutwa*, *Vivada Bhungarnuva*, *Vivudarnuva Setoo*, and other works current in Bengal.

The case having been gone through before the Second Judge, he observed, that it appeared from the replies of the Pundits, that Prannath would be succeeded on his death by his widow, and on her death by his half-brother, the respondent, and that the widow had the power of giving away a portion of her husband's property for the benefit of his soul; and that the *vyuvustha* of the Pundit of the Dinagepoor Zillah Court (which had not in the slightest degree been controverted by the opinion delivered by the legal authorities in this Court) declared that the widow has the power of alienating by gift from one to three-sixteenths of her husband's property. He was therefore of opinion, that it would be advisable and proper to amend the judgment of the Zillah Court, which altogether annulled the deed of gift executed by Adiah Mye Dibia in favour of her own brother (the appellant) on the 16th of *Aghun* 1219 B. S. as well as the decree of the Provincial Court by which the above decision relative to the deed of gift was upheld, to award to the respondent possession of a 6 anna share with mesne profits from the date of the Zillah Court's decree, and the remaining 3 anna share to the appellant as donee under the above deed; to make the parties pay the costs of all

1826. three Courts in proportion to the award against each, and to allow Bhugwutee Churn Rai, who appeared as an *Oozdar*, the power of instituting a regular suit, should he still consider himself as possessing any claim.

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jiah.
The case was next brought before the Third Judge (C. T. Sealy) on the 23d of January 1826, who, having perused all the papers in this case, as well as the copy of a decree passed by the Moorshedabad Provincial Court, on the 20th of July 1819, which had been filed by the respondent's pleader, recorded his opinion to the following effect:

"It appears that the respondent sued to set aside a deed of gift executed by Adiah Mye Dibia, widow of the late Prannath Bunhoorjiah in favour of her own brother, the appellant, who, on the other hand, adduced evidence to establish its validity. Although the *Shasters* allow the widow of a childless Hindoo to give away a portion of her late husband's property for the benefit of his soul, yet it does not appear that the present gift was made by Adiah Mye Dibia to her brother with that view; and, if the Court were to sanction a gift of the present nature, every Hindoo widow would be alienating by gift her husband's property to her brothers and relations, and would thereby deprive her husband's heirs of their just rights. It appears moreover, from a decree of the Moorshedabad Provincial Court, dated July the 20th, 1819, filed this day by the respondent's pleaders, that Prannath Bunhoorjiah, husband of Adiah Mye Dibia, during his lifetime, made a gift to Radhanath Mookurjiah of the mouzas Furadpoor and Deegha, for the use of an idol. This gift was allowed and held to be valid by the Register, and the Provincial Court, on the authority of the *vyavustha* of the Pundits of the Court, and a decree passed in Radhanath's favour which had never been reversed in any Court of justice, but on the contrary upheld. Notwithstanding this, however, Adiah Mye Dibia had given her brother a 9 anna share of the above mouzas. I am therefore of opinion, that the decisions of the two lower Courts relative to the gift of the 9 anna share should be affirmed; that the appellant should pay the costs of all the three Courts, and meane profits from the date of the Zillah Court's decree until he shall have restored possession of the lands."

In consequence of this difference of opinion, it became necessary to submit the case for the consideration of a third Judge, and it accordingly came to a final hearing before the Fifth Judge (A. Ross) who observed that, from the *vyavustha* it appeared, that the widow of a Hindoo had the power of making a gift of from one to three-sixteenths of her late husband's property for the benefit of his soul, and the gift of nine-sixteenths made by Adiah Mye Dibia to her brother was therefore illegal; that, besides, it seemed that Adiah Mye Dibia, when she executed the deed of gift, was only fifteen or sixteen years old, and it was therefore probable that her brother (the appellant) had persuaded her to execute an instrument according to his own views and wishes. For these reasons he thought the Court would not be justified in upholding the validity of the deed, and considering the judgment of the two lower Courts to be proper and unobjectionable in every

respect, he, in concurrence with the Third Judge, passed a decree 1815.
 dismissing the appeal and affirming the judgment of the Courts
 below, making all the costs of the three Courts payable by the ^{Ramchand-}
 appellant, and awarding to the respondent possession of the lands ^{der Surma,}
 in dispute, with mesne profits from the date of the Zillah Court's ^{v. Gang-}
 decree till such time as restoration should be made. ^{govind}
^{Bunhow}

Bhugwuttee Churn Rai the *Oozdar*, was at the same time ^{int.}
 informed that he was at liberty to institute a regular suit for the
 recovery of any rights which he might consider himself to possess.

DYALNATH and others, Appellants,
 versus

KEWUL RAM and others, Respondents.

1828.

Feb. 22nd.

THIS was a suit instituted in the Benares City Court on the 20th of February 1815, by the appellants against the respondents; to recover Rs. 525., being a moiety of the value of certain donations.

The presents made by pilgrims of certain sects to any one of the Benares *Gangapootras* or conductors, must be divided equally among them all, according to the usage of the tribe.

The plaint set forth, that the plaintiffs and their family in the exercise of the vocation peculiar to their sect from time immemorial, were the first *Gangapootras* or conductors who met the Ranees Ruttun Koonwur, at a place called Ramnuggur on her pilgrimage to Kashee (Benares) and performed the ceremonies customary upon such occasions, and that afterwards, the defendants joined her at the instigation of one of her relations; that on the next day they accompanied the boat which carried the Ranees, to the ghaut called Assee Sungum, the plaintiffs swimming and the defendants going in boats; that consequently, according to ancient usage, they were entitled to a moiety of the presents made by the Ranees; that the defendants wishing to deprive them of their rights, they laid the matter before the magistrate, by whose order the property given, amounting in value to Rs. 630, was seized by the city Kutwal, but restored on the 19th of January 1815, to the defendants, on their giving security; while the plaintiffs were referred to a regular suit. The plaint proceeded to state that Rs. 315, being half the amount of the property made over to the defendants, and Rs. 210, half the value of other property received by the defendants from the Ranees Sircar, was what they now sued for, the total amount of their claim being Rs. 525.

The defendants, in answer, declared the claim preferred by the plaintiffs to be wholly unfounded, and stated that the above named Ranee, who had for nine generations been the *Jayman* of their family, gave all the property specified in the plaint, at the time of the eclipse, while she was on the Ganges to the defendant Kewul Ram, as could be proved by the letter written by the Ranee, which was attached to the Kutwal's report contained in the proceedings of the Foujdaree Court; that when the Ranee, on

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former occasion, came on a pilgrimage to that city, in the year 1866 *Sumbut*, she gave to them (the defendants) all the gifts and *Duchhna* or sacrificial fees; that it was an established custom from time immemorial among the *Gungapootras*, for a pilgrim to insert in a book the name of whatever person of their sect he might wish to employ as his *Purohit* or officiating priest, and if a *Jujman*, after having made the usual presents to his *Purohit*, chose to give any thing to the other *Gungapootras*, he (the plaintiff) had nothing to say to such extra donations, and that the plaintiff had unjustly instituted the present suit against them at the instigation of fraudulent individuals for the purpose of injuring their characters.

The plaintiffs, in replication, maintained that there were six tribes by whom no *Gungapootra* had ever from time immemorial been appointed to officiate specially as *Purohit*, viz. the *Mahratta*, the *Jhireah*, the *Ooriah*, the *Bengalee*, the *Parbuttee* or hill tribe, and the *Gosains* or *Fakeers*. The *Gungapootra* who accompanies and conducts a pilgrim belonging to either of these six tribes into Benares becomes his *Purohit*: that as the Ranee was of the *Jhireah* caste, the allegation of the defendants that they had been her *Purohit* for nine generations was entirely false, and that when the Ranee came to Benares in 1866 *Sumbut*, Sheopershawd *Gungapootra* was her conductor, and received presents and donations from her without any opposition on the part of the defendants.

The defendants in rejoinder, stated that they did not receive from the Ranee any presents besides property to the value of Rs. 630, as particularized in the proceedings of the Foujdaree Court, and, that the Ranee being of the *Chowhan Rajpoot* caste, and long resident at Sumbul Gurh, to the westward, was not a member of the six tribes mentioned by the plaintiffs, and was their ancestral *Jujman*.

On the 19th of May 1818, the Register of the City Court, in deciding this case, observed, that it appeared from the statements of the witnesses Nagirnund, Bijyenund, Bustee Ram and Rampershad who belonged to the same caste as the parties in the case, that Ranee Ruttun Koonwur belonged to the *Chowhan Rajpoot* tribe, but in consequence of residing in the *Jhireah* territory had become incorporated with the *Jhireah* sect, and according to the usage of the *Gungapootras*, was considered as a member of that body; consequently, in conformity to the customs prevalent among the *Gungapootras*, the plaintiffs were entitled to receive from the defendants a moiety of the presents, inasmuch as they went out to meet the Ranee and became her conductor. As, however, it appeared from the evidence of Moorlee, Dhar, Teekha Lal, Rampershad and Deo Duit, the witnesses of the defendant, who were summoned to depose to the value of the presents, that the plaintiffs in their claim had overrated their moiety, and the proceedings of the Foujdaree Court declared that the defendants after giving security, received from the Court presents amounting in value to Rs. 630. 11, only a moiety of this sum should be awarded to them, he accordingly passed a decree awarding to the plaintiffs Rs. 315. 5. 6. and dismissing the rest of their claim. As the award in favour of the plaintiffs exceeded Rs. 300, and as a suit for any sum from

Rs. 300 to Rs. 800, required a thirty-two rupee stamp, all the costs were made payable by the defendants. 1826.

Both parties appealed to the Benares Provincial Court, the plaintiffs for Rs. 209. 10. 6, the balance of their original claim dismissed in the City Court; and the defendants for Rs. 315. 5. 6, the amount which had been awarded to the plaintiffs. On the 20th of February 1821, the First and Officiating Judges of the Provincial Court concurring in the decision of the Court below, relative to the point appealed from by the plaintiffs, dismissed their appeal with costs, and affirmed the decree on that point. Disapproving, however, entirely of the award made by the City Judge which formed the groundwork of the appeal preferred by the defendants, they passed a decree in their favour, reversing the judgment of the lower Court, and making all costs payable by the respondents (original plaintiffs.)

A petition for a special appeal was preferred to the Sudder Dewauny Adawlut by the present appellants. The Second and Third Judges (C. Smith and S. T. Goad), adverting to the ancient custom of dividing the presents, and to the incompetency of the donor to disturb established usage, did not see any ground for reversing the judgment of the City Court passed in favour of the petitioners. They therefore considered it expedient to allow a farther consideration of the case. The respondents, although they had acknowledged the receipt of the summons issued by the Court, did not appear either in person or by their Vakeels. The cause came to a hearing on the 3d and 4th of May 1825, before the Second Judge (C. Smith) who, having perused all the papers, recorded his opinion to the following effect: "I am of opinion, on the ground stated in my proceeding on admitting a special appeal, viz. the established usage among the *Gungapootras* in the city of Benares, that the decision of the Register's Court is perfectly just and proper; that the appeals preferred by the parties were altogether improper, and that this Court shouold award to the appellants Rs. 315. 5. 6, the amount decreed in their favour in the City Court, and dismiss their appeal for the remainder of the claim; he therefore ordered the papers to be laid before another Judge for his concurrence in the following order: That the decree of the Benares Provincial Court be reversed, and that of the Register's Court be confirmed; that the respondents pay to the appellants the sum of Rs. 315. 5. 6, with interest from the date of this decree till payment be made. The costs to be made payable by the parties in proportion to the award against each."

The case was next brought before the Third Judge (C. T. Sealy) and the proceedings having been gone through; he delivered his judgment in the following terms: "It appears from all the evidence adduced in this case to be the custom among *Gungapootras* for the conductors of pilgrims to divide among themselves whatever presents any one of them may have received individually, and accordingly the evidence of the witnesses Nagirnund, Bustee Ram and Rampershad, who are of the same caste as the appellants, proves that the presents made by the husband of Rane Buttan Koowur were equally shared by all the *Gungapootras*.

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or conductors; and consequently it is clear that the allegations of the respondents relative to the Ranee's name being written in their *Jujmanee* book, are altogether false, and that no credit can be attached to the letter purporting to be written by her to the City *Kutwal*; for if the Ranee had really been the *Jujman* of the respondents for nine generations, her husband would certainly never have given the presents to others." On this ground, and for the reasons mentioned in the proceeding of the Second Judge, he fully concurred in the opinion expressed by him. A decree was accordingly passed, reversing the judgment of the Provincial Court, affirming the decision of the Register's Court of Benares, and awarding to the appellants the sum of Rs. 315. 5. 6, with interest from the date of the Register's decision till payment should be made. The costs of all three Courts were made payable by the parties respectively, in proportion to the award against each.

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MUNSURNATH CHOWDHRY and others, Appellants,
versus

Feb. 20th. BHOWANY CHURN and others, Respondents.

Held that a suit will not lie against a Malik or Malik-Mo-kuddim with whom the decennial settlement was concluded in Bhaugulpore, for Chukladaree or Chowdrace rights or fees.

THIS was a suit instituted in the Bhaugulpore Zillah Court, on the 17th of April 1817, against the respondents by Munsurnath Chowdhry, Shunkernath Chowdhry, and Munneeram (absent), as paupers, to recover chukladaree rights in the mouzas Khoord Churawan, Molna Deh, &c. *Asulee* and *Dakhilee*, in Tappa Dakhilgunge. The suit was laid at Rs. 540 principal, and Rs. 540 interest, from 1215 to 1223 F. S. Total Rs. 1,080.

The plaint set forth, that the plaintiffs and their ancestors had, till 1214 F. S., been, from time immemorial, in possession and enjoyment of chukladaree privileges in the villages abovementioned, and could produce a decree of the Court to establish their allegations; that as the Collector had made a settlement for these villages in the name of Bhowany Churn Putwaree, one of the defendants, who had purchased the proprietary right in them from one Asa Dobey, and as from the accounts to be produced, the sum now claimed was found to be due to the plaintiffs from the defendants, who acted evasively when applied to for payment, the plaintiffs now sued and hoped for redress.

The answer filed on the part of Bhowany Churn Putwaree stated that the zemindaree of Khoord Churawan and twelve other villages, *Asulee* and *Dakhiles*, was publicly sold by the Collector in consequence of an application made by him (the defendant) for the realization of Rs. 941. 14, on the 24th of July 1804, in conformity with the order of the Board of Revenue, and purchased by Gokul Chund Putwaree, who, after receiving an *amulnama*, and other deeds of purchase obtained possession; and, therefore, that the suit now preferred against him (the defendants) was altogether misplaced.

The defendant, Gokul Chund, stated in reply, that he purchased the above villages for Rs. 1,325, at a public sale in the Collector's office; that he was in possession of them, and that the present suit against him was without any foundation.

The plaintiffs, in replication, denied that Mouza Khoord Churawan was publicly sold, or that it was mentioned either in the list of real property produced by the defendant Bhowany Churn or in the *ishtiharnama* published from the Collector's office. They maintained that Muhsseodeenpoor and five other mouzas, were sold to realize the amount of the decree, &c.

The defendants made no rejoinder.

On the 9th of December 1818, the Zillah Judge observed, that as Gokul Chund Putwaree purchased the villages, to the *chukladaree* fees of which the plaintiffs now laid claim, at public auction in the Collector's office, on the 17th of September 1804, obtained the deeds of purchase, and had continued in possession of them to the present period, the claim preferred by the plaintiffs which had not been substantiated, would not lie against the defendants. He therefore dismissed the suit as untenable, with costs.

The plaintiffs appealed as paupers to the Moorshedabad Provincial Court, the First Judge of which dismissed the appeal, and affirmed the decree of the Zillah Court with costs, on the 23d of November 1821.

The appellants at first preferred a petition for a special appeal to this Court, as paupers, which was admitted on the 5th of June 1822, by the Second and Fourth Judges (C. Smith and J. Shakespeare) on the grounds that the public sale of the two villages of Khoord Churawan and Molna Deh was insisted upon by the defendants, and positively denied by the plaintiffs, who were the petitioners; that it did not appear clearly from the documents filed by the petitioners, that these two villages were publicly sold on the 17th of September 1804, in realization of the award in favour of Gokul Chund; and as, in the cause about mouza Chanpoor, the petitioner's application for a special appeal had recently been sanctioned, it was expedient to admit it also in the present instance. Subsequently, in conformity to the orders contained in the proceedings of this Court, of the 6th of March and 25th of February 1824, the appellants filed a stamp of Rs. 50, value of the petition for a special appeal.

In consequence of the absence of Munee Ram, one of the appellants, Lukeenath Chowdhry and Cassenath Chowdhry his sons, and Goureenath Chowdhry and Sunkernath Chowdhry his nephews, appeared as his representatives.

The case came to a hearing on the 1st of December 1825, before the Acting Chief Judge (C. Smith) when all the papers of the case having been read, the following further exhibits were filed by the parties. By the appellants *vakeel*, copy of a proceeding of the Bhaugulpore Zillah Court, dated June 6th, 1825; copy of the statement of the public sale, dated May 15th, 1825; copy of the *lotbundee* or allotment in English, dated May 15th, 1825. By the respondents *vakeel*, copy of a petition from Mhanath Chowdhry on which was written the order of the Collector of Bhaugulpore, dated September 29th, 1804; copy of a petition

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1826. from Bhowany Churn, dated 27th October, 1804; an *amuknama* dated 29th of September, 1804; a letter from the Collector of Bhaugulpore to the Board of Revenue, dated May 29th, 1804; copy of the notification, dated 1st of August, 1826; a paper in English, dated 15th of May, 1824.

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Bhowany Churn and others.

After a perusal of all these documents, the Acting Chief Judge recorded his opinion to the following effect:

" From the papers of the case, but particularly from the account of the auction sale, dated September 26th 1804, it is clear that Gokul Chund Putwaree, on the 17th of that month, only purchased eight mouzas, Muheeoodeenpoor, &c. which were publicly sold in satisfaction of a decree passed by the Moorshedabad Court of Appeal, on the 2d of March 1804. The above paper, which is regularly signed and sealed, and appears in every respect an authentic document, was drawn up ten days after the public sale, and transmitted to the Board of Revenue, and, in my opinion, is deserving of perfect credit. For although the cause has been long pending, the respondents have not produced from the Board of Revenue, or elsewhere, a report of the same date, but of a contrary tenor. It further appears, that the names of the eight mouzas purchased by Gokul Chund Putwaree are, Muheeoodeenpoor, Bishenpoor Kol, Buzurg Kol, Chuk Mukhun, Chuk Sharoo-deen, Shapoor, Moomummudpoor, and Sath Ghurah. The present suit does not relate to the above mouzas, but to the *chukladaree* of mouza Khoord Churawan and mouza Molna Deh, in Tuppah Dakhilgunge, perganna Bhaugulpore; and by their admission, it appears that the settlement for these two villages has been made with Bhowany Churn Putwaree (one of the respondents) from 1215 F. S. to the present time; as therefore they were not included in the public sale which took place on the 17th of September 1804, there can be no doubt that the appellants' claim is properly directed against Bhowany Churn, on the grounds of the settlement, and against Gokul Chund Putwaree, in consequence of the account of the public sale being false. In this case, however, as in case No. 2288, it is sufficient and expedient to award the principal only (Rs. 541) of the *chukladaree* fees from 1215 to 1223 F. S. without interest."

The papers were accordingly directed to be laid before another Judge for his concurrence in the following order: " That the Zillab Court's decree, dated the 9th of December 1818, and the decree of the Moorshedabad Provincial Court, dated the 23d of November 1821, be reversed; the plaintiff's claim decreed for the principal of *chukladaree* fees, viz. Rs. 540, and his claim for a like amount of interest be dismissed, and the costs of all three Courts be made payable by the parties respectively."

The case was afterwards brought before the Third Judge (C. T. Sealy) on the 14th and 19th of December, who, after a due consideration of the case, delivered his judgment in the following terms:

" I was at first doubtful whether the villages Khoord Churawan and Molna Deh, which form two of the five mouzas for the proprietary fees of which this suit has been instituted, had really been publicly sold or not. On reading, however, the original *purwanna*

issued by the Collector, dated the 21st of September 1804, and signed by Mr. Sherburn the Collector, and the original *amulnama* signed by Mr. Hamilton Collector, dated the 26th of September 1804, to the address of Gokul Chund Putwares one of the respondents, which has this day been filed by the respondents *vakeel*, all these doubts were removed. For it appears from it that the proprietary right in five mouzas, and, among them, of Churn and Khoord Churawan and Molna Deh were sold by public auction on the 17th of September 1804, and purchased by Gokul Chund. I am therefore of opinion, that the decrees of the Bhaugulpore Zillah Court, dismissing the appellants claim, and of the Moorshedabad Provincial Court, affirming that judgment, should be upheld, and the costs of the appeal be charged to the appellants: and in the event of any property being found belonging to the appellants, that the costs of the Zillah and Provincial Courts also, in which they sued as paupers, should be defrayed therefrom."

In consequence of this difference of opinion, the case was brought before the First and Fourth Judges (W. Leycester and W. Dorin) on the 24th of January 1826, when all the papers, pleadings, and proceedings having been read, the case was deferred for further consideration, and came to a hearing again on the 20th of February 1826, when judgment was recorded to the following effect :

"This case appears fundamentally to depend on the liability or non-liability of the *Malik Mookuddim*, that is, of the proprietor of any land in zillah Bhaugulpore, with whom the decessional settlement has been made as such, to a claim for *chukladaree* fees. As the *pottah* granted to a proprietor contains no stipulation for the payment of fees of this nature, we are of opinion that, under the existing regulations, as well as those in force at the time when the perpetual settlement was concluded with the defendant, that a claim of this kind cannot lie against him. For though *chowdrase*, *talookdaree* and *chukladaree* fees may have been paid in former times, according to the custom of the then existing government, yet, as now the proprietors of the land are not dependant on any *talookdar* or *chukladar*, a claim for *chukladaree* fees cannot lie against them. We therefore see no sufficient ground for altering the decrees of the two lower Courts." In concurrence, therefore, with the Third Judge, a decree was passed dismissing the appeal, affirming the decrees of the Zillah and Provincial Courts, and making the costs of appeal payable by the appellants. In the event of the discovery of any property belonging to the appellants, it was provided that the costs of the two lower Courts in which they sued as paupers, should be defrayed therefrom.

1826.

Mar. 13th.

BINDRABUN BOSE, *Surberakar*, Appellant,
versus

BABOO JOWAHIR SINGH and others, Respondents.

A mokurree potta executed by a zemindar recover possession of Talook Pasool, laying his claim at Rs. 18,003, in favour of three times the *Sudder Jumma*.
 the Collector's *Dewan* being declared void under section 15, regulation 2, 1793, the heirs of the *Dewan* ordered to relinquish possession in favour of the zemindar, in consideration of their minority and other circumstances; though the death of the zemindar took place eighteen years before the institution of the suit.

THE appellant originally sued the respondents on the 28th of September 1819, in the Moorshedabad Provincial Court, to

THE appellant originally sued the respondents on the 28th of September 1819, in the Moorshedabad Provincial Court, to a zemindar recover possession of Talook Pasool, laying his claim at Rs. 18,003, in favour of three times the *Sudder Jumma*.
 The plaintiff set forth, that Lala Bahadoor Singh, *Dewan* in the office of the Collector of Purnea, took the above talook in farm, in the name of his defendant Zoukee Ram, from Meer Mujeed Oolla, the former zemindar, for ten years, from 1197 to 1206 B. S. and executed a *kuboolout* for the same. At the expiration of this period, he obtained a renewed lease for four years, in the name of Doulut Ram, and got possession under it. Mujeed Oolla died about this time; and in consequence of his sons, Meer Khoomrum and Kasim Ali and the other heirs being minors, the estate, on the Collector's report, came under the superintendance of the Court of Wards, and Seetulpershad was appointed to manage the estate of it as *Surberakar*. When the second lease was out, the *Dewan* presented a petition to the Collector requesting permission to farm the estate in dispute, and to enter into a new engagement, and Lala Ishk Lal, the *Dewan*'s eldest son, entered into an engagement for the whole zemindaree in the name of Doulut Ram, for ten years from 1211 to 1220 B. S. with the Collector, who had been authorized by the Court of Wards, to let all the lands in farm. When this lease expired, the names of the late zemindar's minor sons, who had now attained the age of majority, were registered by order of the Court as proprietors of the estate in the Collector's office, in consequence of an application to that effect made by them in the year 1220 B. S. Lala Dhun Singh was then appointed *Surberakar* by the Court, under regulation 5, of 1812, in consequence of disputes between the cosharers, and was about to make a fresh settlement for the talook when he was opposed by Jowahir Singh, and the other defendants, brothers of Ishk Lal, who having enjoyed possession of it for several years as a farmer, they fraudulently maintained that they were entitled to hold it in perpetuity. On the circumstances of the case being reported by the *Surberakar* to the Zillah Judge, he was directed to proceed against the defendants by a regular suit. In consequence, however, of the *Surberakar*'s death, no suit was instituted. The allegation of the defendants with regard to an *istimraree*-tenure being utterly false, the plaintiff who had been since appointed *Surberakar* now brought this action, in conformity with the order passed by the Court on the 6th of March 1819, against the present defendants, who are joint sharers, and living together as members of an undivided family.

The defendant, Jowahir Singh, stated in answer, that the former zemindar, Syud Mujeed Oolla, alias Abdool Mujeed, granted, previously to the decennial settlement, an *istimraree potta* for

the talook in dispute which consisted of 35 mouzas, and was quite waste, at a fixed annual *jumma* of Rs. 829, to his father Buhadoor Singh, in the name of his friend Doulut Ram, with a view to its being brought into cultivation. Accordingly his father, while alive, and after his death he (the defendant) enjoyed possession, and after discharging the stipulated rents, appropriated the net profits, to substantiate which allegations, he could produce a *mokurrere potta* bearing the seal of the above zemindar, dated the 21st of *Cheyt* 1196 B. S.; a *purwanna*-bearing-the official seal of the Collector of Purneah, and signed by him on the 23d of February 1791, receipts for rents, a letter bearing the seal of the zemindar, and another from Lala Raj Buhadoor, his *vakeel*. The plaintiff's statement relative to his (the defendant's) father having taken the talook in farm for a limited period in the names of Zoukee Ram and Doulut Ram was altogether false; for he was a minor when the *potta* was executed, and ever since he had attained to years of discretion he had always understood that the tenure was by a *mokurrere potta*, and no mention was ever made of a temporary farm. Meer Khoorum Ali and Kasim Ali could easily, with the view to deprive him of his rights, execute a *kubooleut* in the name of Zoukee Ram, and, antedating it, get it falsely attested and placed among the zemindaree records. By the orders passed by Government on the 22d of April 1819, and circulated by the Collector of every district, for the information and satisfaction of zemindars; by section 49, regulation 8, and section 7, regulation 44, of 1793; and clause 5, section 29, regulation 7 of 1799, it is enacted, that zemindars cannot alter the *potta* granted to *mokurrereedars* by increasing the fixed *istimraree jumma*. This principle was recognized in the case of Baboo Ramnarain, grandson of Chundernarain Rai, zemindar, *versus* Gokul Chund and Gopal Chund, heirs of Baboo Ruttun Chund, *mokurrereedar*. The object of the suits was to cancel the *mokurrere potta* granted by the plaintiff's father for mouza Mehwur; and it was carried before the Sudder Dewanny Adawlut, by whom the *potta* was declared irrevocable. His elder brother, Ishk Lal, could not, as falsely stated by the plaintiff, have been in any way a party to the decennial farm of Mujeeb-Oolla's whole zemindaree, for Doulut Ram and Bhagmul took the zemindaree in farm from the Collector in their own names, Ishk Lal being their surety, and, on his death, deposited a sum of money in the Collector's office by way of security, as could be proved by the records, and as the *istimraree potta* granted to his father was executed fourteen or fifteen years prior to the farm obtained by Doulut Ram and Bhagmul, it could not be questioned. His rights could not be affected, or the plaintiff's claim benefited by the circumstance of Seetulpershad and the other *surberakars* having through ignorance and on the authority of evil disposed persons, made incorrect reports to the Collector relative to the *istimraree potta*.

Byjnath Singh and Gopal Singh, the other defendants, considered it unnecessary to urge any thing in reply, in addition to what had been urged by Jowahir Singh.

The First Judge of the Provincial Court, considered that the *mokurrere potta*, the Collector's *purwanna*, the receipts for rents.

1826. bearing the seal and signature of Mujeed Oolla the zamindar; the letter of his *vakil* Lala Raj Bahadur, the *jumma wazil bakes*, and other documents executed in the time of Sestulper-shad the *surberakar*, clearly substantiated the fact of the land in dispute having been held by the defendant's father as a *mokurrerees* tenure; that a fixed and invariable rent had always been paid for them, and that the defendants father had, while alive, enjoyed unmolested possession, and had on his death been succeeded by the defendants. Under these circumstances, the plaintiff's claim to cancel the *mokurreree potta* was in contravention of the provisions of section 49, regulation 8, and section 7, regulation 44, of 1793; clause 5, section 29, regulation 7, 1799; section 8, regulation 18, 1812; and section 2, regulation 8, 1819. He accordingly, on the 30th of November 1821, dismissed the claim with costs, and awarded the defendants possession of the lands in dispute, on paying an annual rent of Rs. 1,829, in conformity to the terms of the *mokurreree potta*.

Bindrabun Boss appealed to the Sudder Dewanny Adawlut. The Second Judge of that Court (C. Smith) after having gone into the merits of the case on the 6th and 7th of April 1825, and perused all the documents and exhibits, delivered the following opinion :

" It appears from the proceeding of the Collector of Purnea, dated the 11th of August 1820, that the records of his office furnished no authentic record of the *mokurrerees* tenure alleged by the respondents. The *purwanna* bearing the initials of Mr. Hesilrigge is not official, and the other documents produced by the respondents are not sufficiently satisfactory to establish their alleged *potta*. From the date, moreover, of the *potta*, which was executed one year prior to the decennial settlement, it is clear that it is not of the description mentioned in section 49, regulation 8, 1793, and even if its authenticity were proved, it would be irregular to uphold it. Besides, the receipt of a *potta* by a *Dewan* from a zamindar has always been very properly prohibited, and so far from being admissible in an official situation, must be regarded as equivalent to a bribe. I am therefore of opinion, that the judgment of the lower Court should be annulled and the appellant's claim decreed, possession of the talook awarded to the zamindars, the respondents *mokurreree potta* cancelled, and the zamindars left at liberty to proceed against them for mesne profits for the period of dispossession, and all costs charged to the respondents."

The case was next taken up on the 26th, 27th, 28th, and 29th of December 1825, by the Third Judge (C. T. Sealy) who expressed his opinion in favour of the authenticity of the *mokurreree potta* produced by the respondents; for although it was not mentioned in the quinquennial register, which in fact does not notice the tenures of any *mokurrerees*, yet it appeared from the Collector's proceeding of the 11th of August 1820, that there was another book in zillah Purnea in which all *istimraree sunnuds* were recorded, and it contains a copy of the present *potta* as well as of the title deeds of other *istimrardars*; a copy of the *purwanna* now produced dated the 23rd of February 1791,

and signed by Mr. Hesilrigge, was likewise to be found in the book of *purwannas* issued by the Collector of Sillah Purnea. The validity of this document could not be affected by the circumstance of its bearing the initials only of that gentleman's name, without any specification of his official character. For on reference to the *mooastajree sunnud* for the year 1196 B. S. dated the 23d of July 1789, and signed by the above gentleman, (which was subsequently made in perpetuity) filed that day by the appellant's *vakeels*, the authenticity of the signature was established. This paper also bore the initials only of the Collector's name, and it was therefore probable that this was, (as is often the case) his usual mode of signature. It appeared, likewise, that in 1791, the revenue and judicial duties were united, and that Mr. Hesilrigge held both offices. There was therefore every reason for the Court to conclude that the *potta* in question was a valid and authentic document. Further, Meer Mujeed Oolla lived twelve years after the execution of the *mokurreree potta*, and received rents according to the terms specified therein, and never opposed the *mokurree* or tenure. The present suit was not instituted till the 4th of Poos 1226 B. S. (8th of December 1819), eighteen years after his death, which happened in 1208 B. S. The Third Judge was therefore of opinion that the judgment of the lower Court should be affirmed, and the costs of both Courts made payable by the appellant. In consequence of this difference of opinion, the case was brought before the Chief and Fourth Judges (W. Leycester and W. Doris) who on the 13th of March 1826, passed a decree to the following effect :

"It is clear that the *mokurreree potta* for talook Pasool produced by the respondents, dated the 21st of Cheyt 1196 B. S., was in reality executed in favour of Buhadoor Singh, at that time the Dewan of the Collector's office, under the fictitious name of Doulut Ram, by Meer Mujeed Oolla the former zemindar. Section 15, regulation 2, 1793, re-enacting the rules of the revenue proclamation issued on the 8th of June 1787 (28th Jego 1194) prohibits the Collector's officers from holding farms of any zemindar in the district; and as it was enacted three years prior to the execution of the *mokurreree potta*, the Court cannot uphold a deed of this forbidden nature. Without advertting to these prohibitions, and even supposing the rule not clearly laid down, common sense and a regard to the public interests, point out the impropriety of a Dewan in the Collector's office receiving a *mokurreree potta* from a zemindar; and far from being one of the lawful privileges of his office, the act is corrupt. Meer Mujeed Oolla the zemindar, having died in 1208 B. S., the Court, in consideration of the extrema youth of his heirs, the whole pergunna being farmed to the Dewan's dependants, and other circumstances of the case, are of opinion that there were sufficient grounds to account for the delay in suing."

A decree was accordingly passed, reversing the judgment of the Provincial Court adjudging the appellant's claim, awarding to the zemindar possession of the talook in dispute, and declaring null and void the *potta* produced by the respondents, who were directed to pay the costs of both Courts.

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MUSSUMMAUT HYATUN and MUSSUMMAUT ASHURUN,
Appellants,
versus
MOOHUMMUD HUSSUN KHAN, Respondent.

Claim to certain lands dismissed; it appearing from the evidence adduced that the property was obtained by a *sarzeeqan* by the defendants' ancestor in the name of the ancestor of the plaintiff.

THIS was a suit instituted by the appellants in the Provincial Court of Patna on the 5th of October 1809, to recover two shares of mouzas situated in Soropore and Behrampore, pergunna Kin-chawur, zillah Tirhoot; the *jumma* of which for ten years was stated to be 20,010 Rupees.

It was stated in the plaint, that the land originally belonged to Ruhm Ali Khan, father of the plaintiff Ashurun, and maternal grandfather of the plaintiff Hyatun.

He from motives of fear occasioned by the injustice of the then rulers, committed the land in trust to Daood Ali Khan *alias* Zair Hussun Khan, and received from him the income arising from it. After the death of Daood in 1180 F. S. the trust was committed to Moohummud Hussun (son of Zair Hussun) who regularly remitted the income of the estate up to the year 1183 F. S. In 1184 Ruhm Ali died, leaving as heiress his widow Koolsoom, and his daughters Bhulin, Durgahin and Ashurun. By the death of Ruhm aforesaid, the land lapsed to the ruler, but was shortly afterwards restored to the heirs of the deceased. Moohummud Hussun remitted part of the revenue to Koolsoom, but refused the rest of it, on which Koolsoom petitioned to have the land given into her own management. This proceeding induced Moohummud Hussun to remit the full revenue to Koolsoom, but on her death and the death of Bhulin, he managed, by the connivance and collusion of Shah Abdoolah, husband of Durgahin, to get the estate entirely into his own power and possession, and by altogether refusing to remit the revenue or any part thereof, laid the foundation of the present action.

It was replied, on the part of the defendant, that the *altumgha* land in dispute never was obtained by Ruhm Ali Khan, but by Daood *alias* Zair Hussun Khan, under the assumed name of Ruhm Ali aforesaid, and from Zair it had descended to his son the defendant Moohummud Hussun; that from the date of the *sunnud* of *altumgha* to the present time was a period of more than fifty years, during which neither Ruhm nor his descendants had come forward to oppose the possession of the land by the defendants family, which would alone constitute a bar to the present action by the limiting regulation of 1793.

The Second Judge of the Patna Court of Circuit dismissed the suit: many decrees had been passed, he observed, acknowledging the general custom of the country in respect to *maash* estates, which was, that they were held under the assumed name of a friend or relation of the proprietor; but the principal point which led him to dismiss the suit was, the fact that during more than fifty years the possession had been undisputed by the plaintiffs or by Ruhm Ali. On appeal to the Sudder Dewanny Adawlut (present G. Oswald, Officiating Judge) the above decision was affirmed, and the appeal dismissed with costs.

Subsequently the appellants put in a petition for review of judgment, on the ground of certain additional evidence in their favour which had lately come to light. The petition was considered on the 23d of November 1824, when the Second Judge (C. Smith) recorded his opinion in favour of a review, on these grounds:

Both parties agreed that the *sunud* of *altumgha* was in favour of a person who was in that document called Ruhm Ali Khan, and the appellants claimed the property as descended from one Ruhm Ali Khan. It had been proved, that on the death of Ruhm in 1184, the *jageer* lapsing to Government, was afterwards restored to his heirs, and not to the son of Zair Hussun Khan. Again, on the death of Zair Hussun, it had been seen that no lapse of the *jageer* to Government took place. The evidence of the appellants witnesses went to prove, that neither the respondent nor his father Zair Hussun ever owned the estate, nor ever held it otherwise than as a trust from Ruhm Ali. On the other hand, the respondent had neither produced any proof, nor attempted to do so, having rested his case merely on his own assertion, that the property was obtained in *altumgha* by his father, under the name of Ruhm Ali. Further, it had been proved, that Ruhm Ali made over one of the mouzas in dispute, by gift to Nusser Ali and another person. This was an act which could only be performed by a proprietor of the mouza so given. From the documents of the case, it appeared that Ruhm Ali died leaving as heirs a wife and three daughters, and no male heir who could exert himself to procure the restitution of the estate. There was, therefore, nothing unusual or improbable in the supposition that the heirs being females might have been content to continue the trust of the estate to Moohuinmud Hussun, and receive subsistence at his hands, without entering their names in the Government books as proprietors of the land. And under all the circumstances, the claim of the appellants had, upon the face of it, more probability of truth than that of the respondent.

The Fifth Judge (W. B. Martin) was opposed to a review, as he considered the former investigation to be satisfactory and conclusive, and saw nothing of weight in the evidence now offered by the appellants.

The Officiating Judge (J. H. Harrington) deemed it necessary to examine the original of a copy of a *purwanna* issued by the Patna Council in favour of Ruhm Ali and his heirs, dated July 1777, or Asarh 1184 F. S. as also the proceedings of the Patna Council upon that occasion.

They were as follows: The Patna Council had looked upon Ruhm Ali Khan as *jageerdar* of the land, and on his death in 1184 F. S. had forwarded to the Supreme Council at Calcutta their opinion on the subject, together with the petition of the heirs of Ruhm Ali, praying to be awarded possession of the *jageer*. The Supreme Council, in reply, postponed giving a final order on the question, till a regulation should have been promulgated respecting lapsed *jageers*. At the same time they authorized the Patna Council, pending the issue of such regulation, to give over the *jageer* into the hands of the heirs of Ruhm Ali deceased. Hence the *purwanna* above mentioned in favour of the heirs of Ruhm Ali.

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The *vakeels* of both parties, in answer to a question by the Chief Judge, professed their ignorance as to whose name had stood in the government books since the death of Ruhm Ali as proprietor of the land. The Chief Judge recorded his opinion in favour of a review of judgment, both on the grounds above named, and also on the following considerations, viz. the provisions of clause 4, section 3, regulation 2, of 1805; the fact that the papers and proceedings relative to the case before the Patna Council, were not produced before the Judge who dismissed the appeal, and lastly, the fact of the Judge having passed no order on a petition sent in soon after his decision praying for a review of judgment.

The Chief Judge then proceeded to examine the merits of the case in pursuance of the decision for a review of judgment; and observed, that if Zair Husun Khan and after him Moohummud Husun Khan, were the actual *jageerdars* under the name of Ruhm Ali, it was probable that, agreeably to the custom with respect to *benamee mehals*, like the one under discussion, as also conformably to the provisions of regulation 37, 1793, they would have entered their names in the government books as proprietors; but if, on the contrary, they had caused the entry of the name of Ruhm Ali, and after him of his heirs, it would furnish a strong presumptive argument in favour of the appellants.

He therefore issued a precept to the Court of Appeal of Patna, directing that Court to collect and transmit all documents calculated to throw a light on that question, and further to procure through the Judges of the different zillahs in which they might reside, the evidence of certain witnesses named by the respondent as essential to his case.

The documents and depositions being transmitted accordingly, were duly considered by the Chief and Fourth Judges (Messrs. Leycester and Dorin). Looking at the *futwa* delivered by the law officers in the case, Sheikh Buhaddor Ali *versus* Sheikh Dhomun(a), and there appearing no reason to alter the judgment already given in this case, they finally affirmed it with costs by the respective parties.

(a) For the doctrine in this case see page 250, vol. 2, of the Civil Reports.

FUTTIH YAB KHAN, Appellant,
versus
 KHAUJA ABU MOOHUMMUD KHAN and others,
 Respondents.

1826.

April 17th.

THIS suit was instituted by the appellant, and one Jaffier, Held that Ali Khan *alias* Nawab Jan, on the 6th of November 1817, in the the Courts Patna Provincial Court of Appeal, to recover from the respondents, are not at a four ana share of the whole pergunna of Bisthazaree and the liberty to mehal of Hatteawan, pergunna Sunnowt, Okree and Nowbutpore question. Bullea, zillah Behar: also the talook of Nurhur, zilla Sarun, the talook of Billowr, pergunna Bissara, the talook of Nooroollapore, pergunna Bhosari, zillah Tirhoot, *altumgha mehals*: eighteen times the annual produce of these lands was estimated at any auth- Rs. 432,000, the income from the land for 18 years, and the rity having sum of Rs. 1,952,000 was claimed as the mesne profits realized jurisdiction, from the land, and the interest on that sum equal to the principal whether on from 1777, to the end of September 1817.

It was stated in the plaint, that Shahbaz Beg Khan (husband of Mussummaut Nadira Begum, who was the sister of Roshun Begum, the plaintiff's grandmother) obtained the above *altumgha jageer* by his personal services, and took up his abode in the city of Patna. Aulum Beg Khan, a native of the same country with Shahbaz, viz. Kabul, arrived from that place at Patna, and although no actual relation of Shahbaz, was, by reason of his being a fellow countryman, allowed by the latter to call himself his brother, and was treated as such, residing with him in the said city of Patna. At the death of Shahbaz, his widow Nadira took possession of all his property, but Aulum Beg's son, by name Buhadoor Beg, preferred a petition to the Council of Patna claiming the property left by the deceased, his reputed uncle. That Council acting upon the authority of a *futwa* delivered by the Mooftees of Patna (but which was universally known to have been false and fabricated) awarded to Buhadoor on the 20th of January 1777, a 12 ana share of the property of the deceased, and the rest to Nadira Begum. She appealed to the Supreme Court, by which authority the decree of the Patna Council was confirmed.

Thus defeated at all points, Nadira Begum was constrained to bring an action for the sum of Rs. 169,014 mesne profits of the fourth share which had been awarded to her, from the date of the death of Shahbaz Khan up to 1778, in the Dewanny Court of the city of Patna. The Judge of that Court, in opposition to the decrees above alluded to, and though he had no power to alter or reverse them, dismissed the suit. Nadira was prepared to appeal against this decision, but both she and Buhadoor Beg died before this could be done.

On the death of Nadira, Roshun Begum the grandmother of the plaintiffs succeeded to the personal property left by her. The heirs of Buhadoor Beg instituted a suit to recover the above property, but it was dismissed by the Judge who heard it. The above Roshun Begum also obtained a fourth share of the Dhool-

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poorah estate by a decree of the Patna Council. After the death of the said Begum, the plaintiffs, having proved their relationship to her, succeeded to the possession of all the personal property left by her, and even proceeded to institute proceedings for the possession of the real property of the deceased, but were persuaded against it, and led to put it off from day to day up to the present time by the contrivances of Buhadoor Beg's heirs.

The claim of the deceased Begum to the four ana share was proved by several documents, and that of the plaintiffs was not opposed to the provisions of section 14, regulation 3, 1793, and section 3, regulation 2, 1805; neither was it contrary to the Moohummudan law, which limited to no lapse of years the decision of a suit involving a question of a wife's portion.

The Third Judge of the Provincial Court, coinciding in opinion with the Second Judge, thought that this case came under the provisions of section 16, regulation 3, 1793, and directed a non-suit. A summary appeal, however, having been preferred to the Sudder Dewanny Adawlut, the Officiating Chief Judge, (C. Smith) on the 25th of September 1820, gave his opinion that the suit should be tried on its merits, as Nadira Begum had obtained an award of a 4 ana share of the property in the Patna Council; as this decree had not been reversed by the Supreme Court; as that Court had no authority to reverse it, and as the regulations did not limit to any period the time after which a decree could be carried into execution, and as regulation 26, 1814, section 14, clause 8, (which directs that after the expiration of a year a decree shall not be carried into execution on the petition of the holder, till the other party has been called upon to shew cause why the decree should not be executed) did not prevent the party petitioning from instituting a new suit on the basis of the previously obtained decree. On these grounds, he being joined by the Fourth Judge (S. T. Goad), reversed the order of the Third and Second Judges of the Patna Court, and directed their proceeding with the trial. Accordingly, the case being readmitted, the defendant Moohummud Yar Khan replied that, during the life of Aulum Beg Khan, he had, by virtue of two deeds of gift signed respectively by Aulum, Beg Khan and Buhadoor Khan, obtained possession of the perguntas of Sunnowt, Okree and Bullea, and Nowbutpore, and inserting his own name in the Collector's books, had remained so seized for more than 34 years, without hindrance or opposition from any one; that if there really had existed any claim to the lands on the part of Nadira Begum, she certainly would have taken some legal steps to enforce it during that long period. That the claim of Aulum Beg was clear both from existing documents and the decree of the Patna Council. That the claim of Nadira Begum was unfounded, and that Roshun Begum could not inherit her property was clear from the result of the case Bebee Roshun *versus* Yar Khan, Omär Khan and others, decided on the 9th of May 1799. He contended that, from the time which had been suffered to elapse, viz. 41 years, from the operation of the decree of 1777 in the Patna Dewanny Court, which never having been appealed against was final, and from the order of the Patna Council awarding to Nadira Begum the 4 ana share.

for life only, both the non-existence of any legal claim on the part of Roshun Begum and the inadmissibility of the present suit, were manifestly established; as to the plaintiff resting his suit on regulation 3, 1793, and regulation 2, 1805, by declaring that sixty years only could bar the institution of a suit, this was a decided proof of the weakness of his cause, for, in the first place, the 14th section of regulation 3, 1793, did not mention sixty years at all, and in the next place, the provisions of regulation 2, 1805, directed that twelve years should be the limit after which actions could not be brought except when the occupant had acquired possession by fraud and violence, or the person from whom the occupant's title was derived had acquired possession by such means: therefore, in the present case, where the property had devolved by inheritance, the law evidently would not permit a hearing.

Mohummud Ameer and Aboo Mohummud, defendants, replied, that Shahbas Khan had made over the *ultumgha* property publicly to Buhadoor Beg, who further, after the death of Shahbaz, obtained possession of all the property left by him; that Nadira Begum bringing an action against Buhadoor Beg, founded on a certain document afterwards discovered to be forged, the result was, that Buhadoor Beg obtained a 12 ana share of the lands and to Nadira was awarded a 4 ana share for life only: This decree was afterwards reversed by a *sunnud* issued by the Patna Council, confirming to Buhadoor Beg, son of Aulum Beg, the *ultumgha* rights formerly possessed by Shahbaz Khan, after which Nadira, although she obtained an award of the 4 ana share of the real and the same of the personal property of the above Shahbaz, was subsequently induced to sign a deed giving up all right to them. But by the advice of evil counsellors, she afterwards instituted a suit for the property in the Dewanny Court of Patna. This suit was dismissed by the Judge of that Court, on the ground of the time which had elapsed between the occurrences which gave rise to the case and the institution of the suit. Nadira, after this lived three years, yet never preferred any appeal, and the defendants continued in possession of their respective portions of the lands. The plaintiffs had never taken any legal steps for the assertion of their claims, though questions concerning the *ultumgha* property had frequently been before the Zillah Court; neither had they preferred any claim when the defendant Ameer Khan made over the *mehal* of Nirhur to his son, nor when he had mortgaged the same property. Therefore by regulation 3, 1793, and regulation 2, 1805, the present suit was inadmissible. The defendant Kumroodeen Khan, in his reply, stated that he had obtained possession of his part of the land in question by virtue of a *mokurreree sunnud* signed by Buhadoor Beg and Aulum Beg, in the year 1216 F. S. He had made over to his son the whole of his portion except twelve monzas, which, in 1220 F. S., he made over to his brother Kurreem Khan; further he followed the same ground of reply taken up by the other defendants.

The defendant Khauja Jemal Oodeen Khan, denied having anything to do with the suit. He stated that he held some monzas.

1828. by a *mokurréras' pottak* from Aboo Moohummud Khan. It coincided with the replies previously delivered.

**Sattili Yab Khan, &c.
Khanja.
Abo-Moo-
hammad
Khan and
others.** The Officiating Judge of the Patna Court of Appeal, in delivering judgment, expressed himself as follows: "According to the tenor of the award obtained by Nadira of a three ana share out of 12 anas of *altumgha* land, in the case of Buhadoor Beg versus Nadira Begum, before the Patna Council in 1777, the heirs of the said Nadira cannot claim any part of the land so awarded, it being clearly for the life of Nadira Begum. If the plaintiffs consider themselves entitled to the property left by Shahbaz Khan as legal heirs, then the length of time which has elapsed comes into consideration as a bar to their obtaining it. However, putting other circumstances out of the question, the decree of the Patna Council is final; and cannot be reversed now by this Court." He, therefore, dismissed the suit with costs. The plaintiff appealing against this decision to the Sudder Dewanny Adawlut, the case came on before the Second Judge (C. Smith) on the 16th and 23d of June 1828. His opinion was to the following effect: Neither party denied the decree of the Patna Council of 1777, by which, out of 12 anas, three were awarded to Nadira Begum, and nine to Autum Beg Khan. The share allotted to Nadira was on the ground of her being the widow of Shahbaz. This right of course did not cease during her life. But a share awarded to a widow on these grounds becomes her absolute property, and after her death descends to her heirs. The words "during her life" certainly are to be found in the decree of 1777; but they were not in the *futwa* on which that decree was founded, and, by the Moohummudan law, the property of a widow in the share awarded to her from her husband's property after his decease, does not become extinct with her life, but descends to her heirs. It must be presumed that the intention of the decree was to accord with the *futwa* of the law officers. On this view of the case, it was evident that three shares out of twelve were awarded to Nadira Begum. Therefore, without the necessity of reversing the decree of the Patna Council, the heirs of Nadira could establish their claim. The reversal of the above decree was not in the power of the Judges of the Supreme Court, nor had they reversed it. He (the Second Judge) had already given his opinion (*vide Roobakaree* of 25th September 1820, quoted above) that the Dewanny Court of the city of Patna had no authority to reverse the decree of 1777. In the first place, a City Court had not the power of interfering with any decree of the Patna Council, and, in the next, the very *altumgha mehals* to which the decree of the Council related, were situated out of the range of the jurisdiction of the City Court, which therefore, could neither dismiss nor decree an appeal from the authority of the other. From the proceedings of the City Court, dated November the 19th, 1798, it was seen that the Judge of that Court did not consider himself authorised to try the case, and at first refused to admit it. Why it was afterwards admitted the Second Judge professed himself at a loss to conjecture, and was of opinion that it was an act unsupported by, or rather in direct opposition to the existing regulations. Those proceedings therefore might be considered null and void: in like manner the proceedings on the appeal from the City Court's

decision to the Patna Provincial Court, being founded on those of the City Court, were null and void. The relationship of Fattih Yab Khan and Jaffer Ali Khan to Nadira admitted of no doubt. It appeared that from the death of Nadira, Bahadoor Beg Khan and his heirs had appropriated the profits from the share of Nadira aforesaid. Had the Provincial Court of Patna proceeded to settle what those profits amounted to, it would be necessary for this Court to award them; but, as they had not, he considered a new trial ought to be granted. Accordingly he passed a decree amending that of the Provincial Court, and directing that the fourth share should be awarded to the plaintiff, and that they should proceed to sue for the mesne profits by a new trial.

The Third Judge (C. T. Sealy) agreed with the Second, that the insertion of the words "during the life" had been made through mistake, or fraudulent alteration, on the part of some interested person; since those words were not in the *futwa*; and, it was to be presumed that the decree was meant to correspond with the *futwa*. But, at the same time, he was of opinion, that Nadira Begum, on obtaining the award, considered it to be only for her life. If she had demurred at that time, she was then at liberty to appeal to the proper authorities to obtain a reversal of the decree. He did not think that the law would allow of this Court's reversing or altering the decree of 1777, on such grounds as had been proposed; and, therefore, thought the appeal could not be favourably received. Nadira Begum had sued in the Dewanny Court of the City of Patna for arrears due to her for seventeen years on the fourth share awarded to her, but the suit was dismissed, from the circumstance of its not having been brought within the period of twelve years, as prescribed by the regulations. Therefore the decree of the City Court was final, and certainly had authority, as far as related to the *mehals* subject to the jurisdiction of the City of Patna, though it had not over those beyond it. The decree of the Patna Council was only "for life" therefore the appellant could not set himself up as heir to Nadira in the *altungha* property she enjoyed during life. On these grounds he was of opinion, the decree of the Provincial Court of Patna should be affirmed with costs.

The Chief Judge recorded his opinion, that the decree of the Provincial Court of Patna should be affirmed, because the case had been tried and decided in 1796, and, by the 16th section of regulation 3, 1793, could not now be again admitted. Besides which, the parties might then have appealed, if dissatisfied with the decree. Though the *altungha mehals* were beyond the jurisdiction of the City Court, yet both parties lived in the city, and the suit was for a certain sum in cash, and not for the land. Therefore that Court had authority to try and determine the case. It was not now possible to determine whether the fourth share had been awarded or not, on account of the length of time which had elapsed; and on account of the decree of the City Court of Patna and its being final, from the circumstance of no appeal having been preferred. The provisions of section 3, regulation 2, 1805, had nothing to do with this case, because the respondent had obtained possession by an award of Court, and not by fraud or violence. By

1826. the terms of the decree of 1777, which awarded a fourth share for life to Nadira Begum, the claims of her heirs to the property could not be admitted. The terms, "during life," were not in the *futwa* of the Patna law officers, but that *futwa* stated that Nadira had no claim to the *altumgha* land. That *futwa* might be legal or not, but, after such a lapse of time, when it is considered that no objection was taken to it at the time, this Court could not take into consideration whether it was or was not according to the Moobummudan law. The award of the Patna Council exceeded the terms of the *futwa*, when it gave a fourth share of the *altumgha* property to Nadira at all." The Fourth Judge (W. Dorin) pronounced judgment in this case to the following effect: "The principal argument of the appellants seems to be that the decrees of the Patna Council, passed in 1777, and of the Patna City Court passed in 1796, were wrong, and that the widow was legally entitled to what is now claimed; to which the respondents reply, that the decrees were proper, and that no appeals having been preferred from them, they cannot now be touched, under section 16, regulation 3, 1793. I am of opinion, that the respondent's latter objection is valid, and that the decrees in question, whether right or wrong, preclude us from jurisdiction now, and that we cannot enter into the merits of the case. The decree of the Patna Council restricts the widow's right to the produce of one-fourth for life; and the decree of the City Court, in a suit instituted eighteen years afterwards, declares her demand to the produce then sued for, lost on account of lapse of time (twelve years). It should be observed, in consequence of passages in the opinions of the other Judges, that in my judgment, the decree of the Patna Council, in as far as it did not award a fourth share of the *altumgha* to the widow, was not against the *futwa*, for the *futwa* excluded the *altumgha* from being viewed as part of the estate at all; and that as to the Patna City Court not having had jurisdiction in the suit before it, the claim to the produce from 1777 to 1796, was a claim for money alleged to be due from the defendant, and was hearable wherever the defendant resided, and not solely where the land was situated." The opinions of the Chief, Third, and Fourth Judges thus tending to the same point, the decree of the Court below was affirmed, and the appeal dismissed with costs in both Courts.

2226.

BJNDRABUN CHUND RAI and others, Appellants,
versus
BISHUN CHUND RAI, Respondent.

April 28th

THIS action was brought in the Zillah Court of Backergunge, on the 10th of May 1819, by the appellants, to recover from the respondents a one ana fifteen gunda share of the portion of an estate which formerly belonged to Narotum Rai. The suit was laid at Rs. 506. 12. 19, the *jumma* for three years.

It was stated in the plaint, that out of the whole estate of Narotum Rai (who was brother to the plaintiff's great grandfather) a share of one ana fifteen gundas belonged to Hurchunder Rai, deceased, the plaintiff's father, and four anas and a half to Ramkishwur Rai, deceased, the defendant's father. The rest of the estate was in the possession of the sharers to it, according to the deed of division, dated 1187 B. S., and signed by Mussummaut Tulea, widow of Narotum aforesaid. In this estate, also were certain portions and fractional portions termed *howala* and *neem howala*, held separately for the benefit of all the joint proprietors of the rest; viz. one portion situated in Luskerpore appertaining to the talook called Kishen Chund's, the *jumma* of which amounted to Rs. 191. also a portion situated in the talook called Narotum Rai's *jumma*, Rs. 922, also a fractional portion held by the same person, and called Ramsunker Sein's; and lastly, a whole portion called Narotum Rai's, the *jumma* of which was Rs. 429. the amount of the whole being Rs. 1542.

By general consent of the partners to the estate, they were jointly possessed of the profits, and the plaintiff's father, and the plaintiff had regularly received their portions of the profits of the above shares from Kishwur Rai, and after his death from Ramkishen Chukurbutee his agent, as also from the defendant from 1208 B. S. Since 1209 the defendant had omitted to pay their shares of the *malgoozaree* to the plaintiffs, who, therefore brought an action against him for sums due on that account, from 1209 up to 1218; being Rs. 1687. But though this claim was made out clearly on investigation, the Judge dismissed the suit, and his dismissal was affirmed on appeal to the Provincial Court. But as they were by the deed of division entitled to the talooks and *howalas* above-named, they brought the present action to establish their claim.

The defendant in his reply, denied the above statement, and declared that he had no concern with any talooks or *howalas* belonging to the plaintiffs. The case, as he stated it, was this: Mussummaut Tulea, in the year 1187, signed a deed in favour of all the partners now in possession, making over to them all the property left her by her husband, Narotum Rai deceased; excepting only Narotum Rai's *howala*, that half *howala* called Ramsunker Sein's, and the half *howala* called Purtaub Chund's, which she kept for her own subsistence. Agreeably to this deed, the partners took possession of the property thus divided. Subsequently, in 1192 B. S. Mussummaut Tulea, by and with the consent of the partners, gave by deed to the defendant, the *howala* called Ramsunker Sein's. On the death of Tulea the partners to the rest of the estate divided and took possession of the

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Bidrabsen Chund Rai and others, v. Bishun Chund Rai.

half *howala* of Purtaub Chund. The decrees in the Zillah and Provincial Courts were enough to nullify the claim set up by the plaintiffs, and though they had in another suit recovered a ten cowrie share, yet an appeal against that decision was still pending in the Sudder Dewanny Adawlut. But above all, the time which had elapsed (33 years) between the date of the deed of division and the institution of the present suit would alone operate against the hearing of the case, by the provisions of the existing regulations.

On the 15th of February 1821, the Acting Judge of the above Zillah gave judgment in the case. He considered that the documents, &c. brought forward by the plaintiffs, established their claim fully, while the reply of the defendant relating to the time which had elapsed between the date of the deed of division and the bringing of the present action was not entitled to any weight in the question; the fact of the plaintiff's having received *malgoozares* from the defendant's father and the defendant up to the year 1208, being satisfactorily made out; and, although it was true, that from 1209 to the 9th *Bysakh* 1226 (the date of the plaint,) seventeen years and twenty-nine days had elapsed, yet there was another consideration which the defendant had overlooked, viz. that in the prosecution of a suit for *malgoozares* due from the same property to the plaintiffs, a period of five years, ten months and five days had been consumed, which left somewhat under twelve years, during which no steps had been taken by the plaintiffs on this question, and which therefore brought the case clear of the rule of limitation fixed by the regulation. As to what had been brought forward on the part of the defendant, viz the deed of division dated 1177, signed by all the partners to the estate; it did not make out the fractional portions sued for as belonging to the estate of the said sharers, neither did it remove the impression on his (the Judge's) mind that the suits brought by the several sharers one against another had been purposely designed to frustrate the plaintiff's claim. For it appeared from copies of certain proceedings put in on the part of the plaintiffs, and from certain *purwannas* issued to Gungadhar Amaen, that the plaintiff's father, and Odey Chund had obtained from the Ameen appointed to attach the estate, an award of certain sums due as *malgoozaree* for the *howalas* or portions (comprised in the estate called Narotum Rai's) up to the year 1196 B. S. To the deed of gift purporting to have been executed by Mussummaut Tulea aforesaid, which the defendant had produced to prove that the half *howala* or portion called Ramunker Sen's had been made over to him by the said Mussummaut Tulea, there were two objections; first, that it was unsupported by evidence, and secondly, that the provisions of the deed of division executed by Mussummaut Tulea were conclusive against any such deed as the one under consideration; since that deed of division expressly set forth that the portions reserved by her, (the said Mussummaut Tulea), should at her death be divided among all the partners to the estate. Mussummaut Tulea therefore was not likely to have sold or given away any part of the reserved land, without the consent of the partners above mentioned.

A deed of adoption, *anoomaas putr*, had been produced by the defendant, to shew the consent of the partners to the said arrangement, but he (the Judge) did not look upon it as sufficient for that

Purpose, and under all the circumstances of the case he passed a ~~decree~~ decree for the plaintiffs with costs

On appeal to the Provincial Court of Dacca, this decision was ~~reversed~~ ^{Hindrabati, Champ Rai and others v. Hingoo Chund Rai} by the First and Third Judges of that Court.

They considered the deed of gift as valid and authentic, though, under the circumstances of the case, the Court had no reason to try its validity or otherwise; since, from its date, up to 1208 (seventeen years), more time than was allowed by the rules of limitation, had elapsed. They did not conceive the Zillah Judge to have been correct in bringing the suit within the term of limitation by subtracting five years and odd, passed in another suit, as he had done; for from the date of the deed of gift up to that of the former suit, viz. 1219, a period of 26 years had elapsed, a circumstance which precluded the hearing of the suit, under clause 3, section 3, regulation 2, 1805.

Besides, from a view of the *butwarra* or deed of division of *jumma* and land, in which nothing is mentioned of paying or receiving *malgozaree* and which document is entitled to greater weight, from the fact that no other of the partners but the respondents had proceeded at law respecting the property they (the Court) were not convinced that any payment of *malgozaree* had ever been made by the appellant to the respondents.

On this decision a petition was made to the Sudder Dewanny Adawlut for a special appeal, which was granted on the 27th of July 1822. The reasons for granting a special appeal were the necessity of well considering the validity or otherwise of the deed of gift, and the question as to the time which had elapsed precluding a hearing or not.

The case came to a hearing accordingly before the Second Judge (C Smith) who recorded the following opinion:

"It appears that the plaintiffs in the original suit had brought a previous action in zillah Backergunge, on the 16th of May 1812, to recover certain sums due as *malgozaree* from the same talooks and *howzlas* as those mentioned in the case now in hand, and on the same date the same persons were plaintiffs in a suit for the recovery of a ten cowrie share of an estate held by Kishen Chund."

"This last case having come by special appeal before this Court, was decided on the 28th of February 1821; the appeal of the appellant being dismissed, and the decision of the lower courts affirmed. The ground of this decision was the proof of *malgozaree* having been paid by the defendant up to 1208, but withheld from that date; the objection made by the defendant that the case was without the term of limitation from the time which had elapsed, being overruled by the Courts.

"The same conclusion is now in my opinion inevitable. I look upon the deed of division executed by Mussummat Tulea with the consent of the parties concerned to be valid and authentic, and sufficient to establish the appellant's claim.

"Having seen nothing on the face of the case which was likely to have induced Mussummat Tulea to make such a disposal of the land which she had reserved for her own subsistence as has been alleged by the respondent to have been made, I can give no credence to the deed of adoption or to the deed of gift which that party has produced in evidence: I cannot believe it probable, that after

1826. yielding the property in the manner proved to have been done, and allotting by that division a share of four annas and a half out of sixteen, she should make over to him by gift any part of what she had reserved for her own subsistence, nor do I think the terms of the deed of division left her at liberty to do so without the consent of all the sharers. In short, I consider the deed of gift a forgery, or if not, so as absolutely illegal and invalid.

"The execution of the *butwarrā* likewise I do not believe, since it appears by the evidence that the lands stated to be separated and divided by that deed are still under the joint controul of all the sharers: I therefore am of opinion, that the decision of the Court of Appeal should be reversed."

The Chief and Fourth Judges (W. Leycester and W. Dorin) concurring in the above opinion, the decision was reversed accordingly, and a decree passed for the appellants with costs. The appellants were declared at liberty at the same time to institute a separate suit for the mesne profits.

1826. RAO RAM SUNKUR, (guardian of SURUSWUTTEE DIBIA,).
Appellant,

April 25th.

versus

RANEE TARNEE DIBIA, Respondent.

The Courts are not competent to decide in a new suit, contrary to the provisions of a former final decree relative to the same property. The merits of that decree cannot be gone into. THIS was an action brought by Ranee Tarnee Dibia, the respondent in the present appeal, on the 15th of February 1820, in the Provincial Court of Moorsheadabad, against Lukhee Ishwuree Dibia, widow of Debee Pershad, Suruswutee Dibia, widow of Ram Soondur, the adopted son of the said Debee Pershad, and Rao Ram Sunkur, formerly guardian to the above defendants; to recover certain lands in the districts of Dinagepore, Moorsheadabad and Rajshaye, *khiraj* and *dewuttur lakhiraj*. The triennial *jumma* of the assessed lands was stated to amount to Rs. 100,915. 11. 18. 3; and the value of eighteen years produce of the *lakhiraj* estate was estimated at Rs. 90,000, amounting altogether to Rs. 190,915. 11. 18. 3. The plaint set forth, that the plaintiff after the death of her husband Sham Singh, became possessed of all the property which he had inherited from his father Dulai Rai. After this, Debee Pershad (since dead) brought an action against the plaintiff in the Provincial Court to recover the above property, which claim he founded upon a declaration that the plaintiff had adopted him. In that Court he was cast, it not being satisfactorily shewn that the permission of the plaintiff's husband had been obtained previous to the alleged adoption by the plaintiff. In the Sudder Dewanny Adawlut, however, he obtained a decree, on the ground that the plaintiff performed the ceremonies of adoption, and treated him in every respect as her son, although the adoption was not conformable to the rules laid down in the *Shasters*, as expounded by the Pundits of that Court. That decree of the Sudder Court provided that, in the

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event of the heirs of Sham Singh instituting a suit for the property left by him, the decree should be no bar to enquiry into their claims. On these grounds the plaintiff, during the time when the names of the heirs of the said Debee Pershad were in the Collector's books for the property, was prepared to institute a suit against them. At this time, however, an action was brought by Ram Lochun, the grandson of Dula Rai (plaintiff's father-in-law) against the heirs of Debee Pershad on similar grounds. This was dismissed, on the ground that it was not admissible during the life of the plaintiff and the heirs of Debee Pershad. On appeal to the Sudder Dewanny Adawlut, that Court also held, that the action of Ram Lochun would not lie; not on the ground assigned by the Court below, but because the plaintiff alone was the rightful heir, and an order issued that the plaintiff, if she was desirous of establishing her claim to the property, might bring an action for it, as by the Hindoo law she had a claim justly to the property after the demise of Debee Pershad.

The reply set forth, that Debee Pershad, by a decree of Court, had obtained possession of the property in dispute. He adopted, some time before his death, Ram Soondur Rai, husband of Suruswutee Dibia (a minor), and made over to him all his property; but on the death of Debee Pershad, the son thus adopted (being under age) took possession of the property accruing to him, by means of a guardian appointed by the Court of Wards. He (the minor) dying, the land devolved upon Lukhee Ishwuree widow of Debee Pershad, and subsequently, Suruswutee, widow of Ram Soonder Rai, came into possession under the guardianship of the Court of Wards. The plaintiff had, agreeably to directions contained in the order of Court, received regularly subsistence money from Debee Pershad, and after his death from his heirs. From the tenor of that decree, it would not appear that the property awarded to Debee Pershad was merely for life; nor did the decree in the case of Ram Lochun *versus* the heirs of Debee Pershad, go to direct that the plaintiff should obtain possession after Debee Pershad's death in opposition to the terms of a former decree. On the contrary, it corroborated expressly the claim of Debee Pershad, as established by the former decree. If the plaintiff really had any just claim to the estate, it would have been so stated in the decree. The opinion of the Pundits, which contradicted a former one and which was given without any knowledge of the facts of the case, could not prejudice the right of Debee Pershad or his heirs; besides which, by the regulations, a *vyavastha* which contravened a previous final decree was ipadmisible. If the plaintiff had considered herself as having a just claim to the estate, she surely would not have all this time refrained from preferring it in Court, instead of going on accepting subsistence money from the heirs of Debee Pershad. The present suit besides, was in opposition to section 16, regulation 3, 1793, and regulation 2, of 1805, and was therefore totally unworthy of being heard.

The First Judge of the Provincial Court gave a decree for the plaintiff on the following grounds: The Hindoo law did not consider that adoption legal, which was performed by a wife without the leave of her husband. The adoption of Debee Per-

Rao Ram
Sunder,
Ravee
nee Dibia

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nee Dibia.

shad had been held to be of this description by the several Courts, particularly by the Sudder Dewanny Adawlut in the case of *Debee Pershad versus Ranee Tarnee*, and was therefore illegal. The opinion of the Pandits that Debee Pershad was legally the adopted son of Sham Singh, must have been given under the idea that the act was done with the sanction of the said Sham Singh for the *yuvvusha* declared, that one reason for the supposition was that, unless it was so, there was no accounting for Ranee Tarnee's performing the duties of adoption towards him, the said Debee Pershad, while Neelaunt Rai (Debee Pershad's father) acted towards his younger son as if he considered Debee Pershad no longer belonging to his family. The decree which constituted him (Debee Pershad) the adopted son of Sham Singh, was given on the evidence of Tarnee, contrary to the rules of Hindoo law. The decree contained a clause declaring that no bar was created to the hearing a case involving a question of the inheritance of Sham Singh, and the same Court refused to proceed with the case of Ram Lochun *versus* the heirs of Debee Pershad, during the life time of Tarnee Dibia.

The defendant appealing to the Court of Sudder Dewanny Adawlut, the case came to a hearing on the 5th of January 1826, before the Second Judge (C. Smith). He considered the decree of the Provincial Court as proper, for by the Hindoo law, if there is no son or adopted son, the widow succeeds to the whole estate left by her husband at his decease. By reference to the former cases relative to the same property, decided in the Court of Sudder Dewanny Adawlut, it appeared that the adoption of Debee Pershad was not with the consent and permission of Sham Singh, the husband of Tarnee Dibia; without which, it was not legal according to the forms of Hindoo law; this was further established by the opinions of the two Judges delivered in the first case, and a law of the Shasters could not be nullified by a statement made by Tarnee: as, however, the Judges who tried that case, had, on the ground of Tarnee's statement (a statement which contradicted one previously made by her) considered Debee Pershad as the adopted son, and awarded to Tarnee subsistence merely, during her life, which subsistence she, from poverty or ignorance, had continued to receive, he (the Second Judge) would not confirm the Provincial Court's decree till the case had been before another Judge. Looking at the decree in the former case as incorrect, he would propose to consider Debee Pershad as having merely acted as manager of the estate; and now being dead, the estate should, in his opinion, revert to the heirs of Sham Singh, especially as in the decree aforesaid, no mention was made of what disposition should take place regarding the property after the death of Debee Pershad. He was for affirming the decree of the lower Court. The Third Judge (C. T. Sealy) after considering the terms of the decree in the former case, which gave the property to Debee Pershad as heir, and awarded subsistence to Tarnee, was of opinion that it was not within the province of the Court to question the accuracy of that decree. He considered that it would be establishing a very bad precedent to do so. He added, that he should reverse the

decree of the lower Court, and award the estate to Suruswutee, widow of the son of Debasen Peshad. The Chief and Fourth Judges (W. Leycester and W. Doris), concurred in the above decision for the same reasons, and passed an order reversing the decree of the Provincial Court with costs, observing that, by the decree of this Court passed on the 27th of June 1803, Ranees Tarnee Dibia, the respondent, widow of Sham Singh deceased, was declared excluded from right to the zamindari left by her husband. That the decree in question was conclusive against her, and that this Court was not competent to re-agitate the question.

GOVERNMENT, Appellant,
versus
ABDOOL HAMID, Respondent.

1826.

May 6th.

THIS was a suit preferred on the 21st of November 1818, in the Zillah Court of Chittagong, by the respondent, formerly stamp Darogha under the Collector of that district, for the release of his person and estate from responsibility on account of a defalcation of stamp money to the amount of Rs. 6,225. 8. The plaintiff maintained that having been appointed stamp Darogha, he had, in conformity with the third clause of section 10, regulation 1, 1814, kept a regular account of stamps furnished to venders for sale, as their receipts would testify; that the venders likewise furnished the Collector with monthly account sales, with which the plaintiff had no concern, the money being paid by them or their agents directly into the hands of the treasurer; but that he usually took the precaution of reporting any arrear to the Collector; that he did give such notice in the month of May 1817, and in the following November, acting under the orders of his superior, he apprehended one Nityanund, the stamp vender at the head station, and six others who had since been dismissed; that the said Nityanund then acknowledged the existence of certain irregularities in the office, and produced an account making himself a defaulter to the extent of Rs. 6,225. 8, in liquidation of which he delivered up two bonds executed in his favour by Mirza Hadi Ali, Meer Moonshee in the Collector's office, one for Rs. 4,121, and another for Rs. 2,001.. The Collector, it was added, after having, with the sanction of the Board, realized the arrears due from the other stamp venders, by bringing to sale the property of them and their sureties, advertised the lands of the plaintiff and his surety on account of Nityanund's defalcation, while the estate of that person's surety and of Hadi Ali remained under attachment. The first notice, not having been sanctioned by the Board, was withdrawn; but he had issued a second, and had attached the person of the plaintiff under a communication from the Superintendent of legal affairs under date the 3d of November 1818. It was submitted, that as he (Abdool Hamid) held the Collector's certificate of his having regularly accounted for the stamps entrusted to him, he was not responsible, under the regulations, for the stamp vender's arrears; that he therefore instituted the present suit against the Collector, Nityanund Hadi, Ali and Bakir Ali.

Held that a stamp Darogha is not responsible for any defalcation on the part of the subordinate stamp venders and their sureties.

1826.

Govern-
ment, v.
Abdoel Ha-
mid.

The defendant Hadi Ali was the first to give in an answer, affirming that the plaintiff and Nityanund had collusively embezzled the public money, and that the latter, under the guidance of his associate, had falsely implicated him, the defendant, but that the documents signed with his name were forgeries.

Bakir Ali pleaded that, although he had stood surety for Nityanund, when the Collector, in August 1814, appointed him assistant to the plaintiff, his engagement was voided by Nityanund having been since removed from that office, and appointed stamp vendor first at Ramoo Tek Naf and then at the head station; that his property had been released from sequestration; and that the plaintiff's suit against him was vexatious and unfounded.

It was contended on behalf of the Collector, that the plaintiff having been appointed, on execution of the prescribed engagement, to an office, the express duties of which were to supply the vendors with stamps, as they were required for sale, and to furnish a monthly return to his superior, he was responsible for every deficiency in the stamp money, whether arising from remissness or from connivance and collusion; that though the arrear was mentioned in his accounts, yet it had been ascertained from the information of Nityanund and two others, that the former had lent the money to Hadi Ali by his orders; and by the same accounts it appeared that Nityanund had been allowed to remain in arrear for the amount from the month of September 1816 to the end of the following year; that Nityanund was not a stamp vendor, but an assistant to the stamp Darogha, nominated at his request, without his having even called upon him for security, and that the money had always remained under the plaintiff's charge and could not have been appropriated without his knowledge.

The other defendant did not appear.

An order of nonsuit was passed in this cause on the 18th of August 1819, the claim against the several defendants not being judged to be sufficiently specific. On appeal to the Dacca Provincial Court this order was overruled.

The case having been restored to its former place on the file, the defendant, Nityanund, appeared before the Judges on the 21st of August 1820, and stated that he had been prevented by illness from giving in any answer, and corroborated the Collector's statement, that the sum deficient had been by him paid to Hadi Ali at the plaintiff's order.

It appearing that Nityanund had actually filled the situation of stamp vendor, and as such held charge of the money embezzled, that he and not the stamp Darogha had received the bond said to have been executed by Hadi Ali, and that the plaintiff could not, as had been argued by the government pleader, be made responsible for the defalcation in his office, under regulation 3, of 1793; it being considered that all responsibility for stamp money was vested in the vendor and his surety, by regulation 1, of 1814, a decree was passed in favour of the claim, rescinding, as illegal, the sale of the plaintiff's estate which had been carried into effect by the Collector while the cause was pending, leaving Government to realize the arrear from the property of Nityanund, or in default

of other assets to institute a regular suit against Hadi Ali under the bonds, and releasing the other defendants from all liability in the case. The plaintiff was declared to have neglected his Governmental duty as a stamp Darogha, especially in not bringing to his master's notice that he had forgotten to require fresh security from Nityanund, and therefore not entitled to costs. The defaulter Nityanund was made answerable for those of all the other defendants. It was observed that the Collector, on finding ground to believe that Hadi Ali had knowingly borrowed the public money with the plaintiff's sanction, should, under the regulations, have brought the matter to the notice of the magistrate, and have made application for the bonds to be attached by the Court, but that he had no authority to do so himself.

An appeal preferred by the Collector to the Provincial Court, was dismissed with costs, by the First Judge, on the 8th of November 1821.

At the application of Government, an order was passed by this Court, on the 17th of August 1822, for the admission of a special appeal, which was defended by the respondent in person.

On the 6th of May 1826, the Second Judge (C. Smith) after going through all the papers of the case, expressed his entire approval of the previous judgments. The decisions of the Zillah and Provincial Courts were accordingly confirmed.

RADHA BULLUBH CHUND and others, (heirs of BHOWANNY CHUND, deceased) Appellants,
versus
 JUGGUT CHUNDER CHOWDREE and others, (heirs of GOVIND CHOWDREE, deceased,) Respondents.

1826.

May 6th.

THE original suit in this case was instituted by Govind Chund Chowdree, on the 30th of March 1816, in the Dewanny Adawlut Held that of Zillah Burdwan, to recover from Bhowanny Chund and Maharajah Pertaub Chund, certain lands in the pergunna of Jehan-geerabad, the triennial rent of which was stated to be Rs. 3457, together with mesne profits, &c. Total amount Rs. 4957. 2.

It was set forth in the plaint, that the above-named Rajah, after the death of the Ranees of Maharajah Chatter Sein in 1221 B. S. resumed certain lands which were previously in the possession of the Ranees, having been assigned to them for their subsistence, pertaining to the performance of religious rites; and granted a lease of lands ap- to the estab- period than lishment life.

to grant a lease of the lands ap-

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the estate

the same land, prevented the plaintiff from occupying it. On this the defendant, Bhowanny Chund, who was an ejected tenant from the same land, petitioned the Dewanny Court to obtain possession for the plaintiff by a summary process, which, however, could not be

1826. obtained, the Judge considering the previous possession by the above named Bhowanny Chund as a bar to any such summary procedure. The Maharajah promised to bring a regular suit and to secure to the plaintiff the occupation of the land, but subsequently making a second settlement with Bhowanny Chund, the plaintiff began to think of instituting a proceeding at law himself.

**Radha Bul-
lubb Chund
and others,
v. Juggut
Chander
Chowdree
and others.** The defendant, Bhowanny Chund, stated in reply, that the lands in dispute had been a *dewutter mehal* for a long period, and according to the custom prevalent in the family, on the death of the Ranees of Kirrit Chund, the Ranees of Maharajah Chutter Sein came into the occupation of them. In the year 1216 F. S. she, after receiving Rs. 501, let the lands at a fixed rent in perpetuity to the defendant; the *jumma* being settled at Rs. 908. 6. After the death of that Ranee the defendant Maharajah Pertaub Chund succeeded to the property, and became *mokhtar* of the *dewutter mehal* which had been assigned for the support of the Ranee. The Rajah then, contrary to the regulations, let to the plaintiff, his (the defendant's) *mokurrerees* property, and sent his people to the estate to put the plaintiff in possession. The defendant applying to the magistrate, he issued an order prohibiting the ejection of the original *mokurgereedar*, and threatening with the penalties of the law, any person or persons who should raise any disturbance on the premises. On a petition being presented by the Maharajah, the Judge, in like manner confirmed the defendant in possession. The Maharajah then, seeing the claim of the defendant to be just, confirmed the *sunnud* of the deceased Ranee, and after receiving a certain sum as *salamee*, added some other lands to the previous *mokurrerees* grant, and issued a new *sunnud* for the whole in favour of the defendant, at a fixed rent of Rs. 1030. 6.

The other defendant Maharajah Pertaub Chund, stated in his reply, that the lands in dispute had come into his possession by inheritance, on the death of the Ranees who had held it as subsistence during their lives; that he let it in *mokurrerees* to the plaintiff; but disputes arising about the occupation of it between the plaintiff and Bhowanny Chund, and orders having been several times issued by the Courts confirming the defendant Bhowanny Chund in the possession of the property, he had at last agreed to allow him to remain, had received from him the *malgoozuree*, and given him documents under his own seal confirming him in his occupation of the estate. The person was now in the occupation who had been recognized by the Courts as entitled to it, and he was perfectly indifferent as to who might obtain possession.

On the 4th of February 1820, the second Register of the Zillah in giving judgment, recorded his opinion that as the Calcutta Court of Appeal had confirmed the right of the Maharajah Pertaub Chund to make his own settlement for the lands which he inherited from the Ranees of Maharajah Chutter Sein (the Ranee's acts with relation to the property being good for her life only) and had cancelled the settlement which had been made by the Ranee, now deceased, and as, acting on this order of Court, the Maharajah had made a *mokurrerees* settlement with the plaintiff and executed the necessary documents thereof in his favour, he (the Register).

held the plaintiff to be the rightful *mokurrerees*, and gave a decree accordingly; the costs of the suit to be paid thus: the defendant Bhowanny Chund to be liable for those of the plaintiff and his own, and the defendant Maharajah Pertaub Chund for his own; with respect to meens profits the plaintiff might sue for them in a separate action.

The defendant Bhowanny Chund appealed from this decision to the Calcutta Court of Appeal laying the suit at Rs. 5,617. 5. 4., being the amount of the suit in the Zillah Court added to the costs thereof.

Govind Chunder Chowdree dying, his brother Jaggut Chunder Chowdree, and his widow, appeared to reply to the appeal in the name and on behalf of the two sons of Govind Chowdree deceased. On the 12th of September 1822, the Second and Third Judges of that Court gave judgment in the case to this effect:

In the case of the elder Ranee of Chutter Sein, appellant, versus the younger Ranee of the same Rajah, the pundits of the Sudder Dewanny Adawlut gave a *vyavustha* declaring that the occupiers of *dewutter* land had no power either to sell, give, or mortgage the same; as they were merely the managers of the *dewutter* land of which they were in possession. By the words of this *vyavustha*, although letting the land on a *mokurrerees* lease is not expressly prohibited, yet such prohibition is to be inferred from the tenor of the opinion, because, by such an act, the heirs of the person letting the land would lose all chance of control over it. Therefore the Ranee had no right to grant a lease in perpetuity to the appellant, nor could such *potta* be recognized as binding after her decease. It was fully competent to the next heir to confirm or cancel such leases. Rajah Pertaub Chund, under this license, let the lands to the respondent, cancelling the lease of the Ranee, and having once done so he could not make a settlement for the same land with another person. On these grounds they affirmed the decree of the Register of Burdwan, and dismissed the appeal with costs. The appellant petitioned the Sudder Dewanny Adawlut for the admission of a special appeal, which was granted by the Third Judge (J. Shakespear), on the ground that the incompetency of the Ranee to let the *dewutter* land in perpetuity was questionable, and that the order of the Provincial Court contained in their *roobuktarees* of the 11th of April and 22d of May 1815, should be reviewed. The Second Judge (C. Smith) having made some previous enquiries as to the quantity of land granted by the Maharajah and the Ranee respectively, proceeded to record his opinion on the 5th of May 1825, to the following effect:

The order of the Court of Appeal on which the decision of the Register is founded, is not applicable to the points at issue; the word *mokurrerees* not being in the *vyavustha*; if it had been it would apply as much to a *mokurrerees* lease granted by the Rajah as to one granted by the Ranee, and render them equally invalid. The decree should therefore be reversed with costs in all three Courts, and meens profits made payable by the respondents; the appellant to be put in possession, and according to the agreement of B. S. to pay a *jumma* of 1,030 rupees.

The Fifth Judge (A. Ross) was of opinion that the decree of the

1826. Register should be reversed, but on different grounds. In a *vyavustha* delivered in a former appeal the pundits had declared the Radha Bul-right to *dewutter* land to be qualified; that is, that the holder Lubh Chund could not let it so as to put it beyond the control of the next and others, heirs. By section 2, regulation 18, 1812, a *mokurreree* lease for such property could not be given, but only one for such time as the grantor should retain control over the property, that is, till his death. Looking at the case in this light, it would appear that neither the Ranee's nor the Rajah's leases were available, as claims for a *mokurreree* tenure, and it appeared to him (the Fifth Judge), that the present Rajah Tej Chunder should have the power of making a new settlement altogether. The above opinion was delivered on the 16th of February 1826.

The Chief and Fourth Judges (W. Leycester and W. Dorin), after examining the *vyavusthas* formerly delivered in the cases of the Ranee, senior, *versus* the Ranee, junior, and Juggut Chunder Sein *versus* Keisoo Anund and others, put the following questions to the Pundits: If, according to the *vyavusthas* in the cases above cited, there is no power to alienate *dewutter* land in any way, and the whole produce is to be assigned to the expences of the *Deota*, and the office of *Shewait* be inheritable, and be meant merely for managing the appropriated lands, is not a grant of a *mokurreree potta* by the *Shewait* to the grantee and his heirs beyond the competence of the *Shewait*? or does it stand good and bind him also who succeeds to the *Shewaitee* by inheritance? or does the Hindoo law, written or unwritten, declare nothing positively on the subject?

Answer.—The practice of granting *mokurreree pottas* in regard to *dewutter* lands is accordant with the rules and customs current in Bengal, and the successor to the management has no right to annul the lease, and makes a new one, unless it may have been stipulated in the *potta*, that if any person should offer a higher *jumma* a new settlement should be made with the person so offering. Such a practice does not defeat the purposes to which the property was meant to be applied, because the lessee pays the rent (which can be appropriated to the service of the *Deota*) and likewise improves and cultivates the land.

This *vyavustha* was opposed by the *vakeels* of the respondent, who produced two other *vyavusthas* of certain of the college pundits to establish their claims, and contending that a *mokurreree potta* given at a low rate by a female *Shewait* would not avail against a better disposition made by the successors.

The appellants *vakeels* also produced a *vyavustha* in confirmation of that delivered by the pundits of the Sudder Court: after examining these opinions, it was deemed necessary further to question the court pundits on the following points: Does the *Shaster* mention *mokurreree pottas*? if it does not, what modern book of Hindoo law mentions them? for the former answer states their legality without any quoted authority; and what book mentions such a *vyavahar* or practice? and wherein is it ascertained and its legality made out? for the Court suspect that the Hindoo law is entirely silent on the subject, and that the Court should decide it under the regulations and former *vyavusthas*.

CASES IN THE SUDDER DEWANNY ADALAT.

The law officers replied to this effect: *Pottas* in perpetuity under the name of *akashan putra*, are mentioned in the *Swasti Chandra Mitrodaya*, *Vyavahara Matrika*, *Vyavahara Chintamani* and *Vivada Bhungsarana*, which are all Hindu Shasters. In them also are to be found the authorities for the practice we have mentioned in our *vyuvustha*.

The Court, in passing judgment in this case, observed, that the law officers of the Court had delivered a *vyuvustha* which they were afterwards unable to support by any legal authorities; that the *vyuvustha* of the pundits of the Supreme Court was in like manner unsupported by any text, while that procured from the pundits of the Sanscrit College was opposed directly to the others. The Court therefore declared their determination to adhere to the *vyuvustha* delivered in a former case of the same nature, the accuracy of which there was no reason to suspect.

Setting aside all consideration of the *vyuvustha* of the Sudder pundits (which it was not deemed necessary to follow) the Court were of opinion that the *potta* in perpetuity, granted by Perlaub Chund in consideration of a certain sum received by him, was illegal and invalid, and it was competent to the present Rajah (having returned the sum so received by his predecessor) to make a settlement for the lands with whomsoever he pleased, provided only that any lease which he might so grant should determine on the grantor's, namely, the Rajah's death.

The Chief and Fourth Judges therefore, concurring in opinion with the Fifth Judge, reversed the decrees of the Zillah and Provincial Courts, and passed judgment accordingly. Costs were made payable by the parties respectively.

RAM PERSHAUD SIRKAR, Appellant,

versus

ODEY NARAIN MUNDUL and others, Respondents.

1826.

May 15th.

THIS was an action brought by the appellant on the 8th of April 1812, in the Zillah Court of the 24 pergunnas, to recover to hold certain lands, from the respondent 17 beegas, 8 biswas of *lakhiraj dewutter* land; ten times the yearly produce was stated to be Rs. 285; also rent free, to recover Rs. 316, profits unduly appropriated from the said lands, from 1208 up to 1217, F. S.

The plaint set forth, that twelve beegas, three biswas of the land appropriated to the service of *Gidhar Thakoor*, having five beegas, five biswas of that appropriated to *Shoo Thakoor*, been held were entered in the name of Ram Ram Dey (plaintiff's grandfather) as *lakhiraj* father) the superintendent of the said *Thakoor*, were divided since 1765, and marked off by Gopaul Chund, plaintiff's father, and had been in the possession of the family for many years. But the defendant had, in the year 1208, forcibly ejected the plaintiff, purporting

1826.

to be an order from the Collector in 1787, on the grounds, either that it was a forgery or had been obtained by fraud or misrepresentation.

from fourteen beegas, six biswas, and, in 1211, from the rest of the above named rent free land, and had taken violent possession of the whole, had removed ryots and put others in, and had collected and kept the rents of the land as its lawful owner.

The defendants in reply denied the whole of the above statement, and set forth that the land in dispute was not *lakhiraj*. Kishun Churnn Dey and Gokul Chund Dey, the uncle and father of the plaintiff, who had been for years farmers of the mouzas in which the said land was situated, had, by forgery and the connivance of the *Ameen* appointed to settle the estate, caused the land of Bodhasee Food, Mungul Das and other ryots previously paying *jumma*, to be inserted in the accounts as rent free and *dewutter*. It was to be remarked that three persons, the uncles of the plaintiff and partners in the estate, being aware of the above facts, had abstained from being parties to the suit, or pressing the question relative to their respective shares. The plaintiff alone had been led by the instigation of some enemies to the defendants to state land to be rent free *dewutter*, and the property of his father, which had been for twelve years notoriously in the hands of the defendants, and its *jumma* regularly paid by them during the whole of that time. To shew the futility of the claim, and the fraud attempted by the plaintiff, it was only necessary to refer to regulation 19, 1793, or to require the production by the plaintiff of the *lakhiraj sunnud* for the land in question.

The replication stated, that the *lakhiraj sunnud* was lost during the disturbances which took place in Cuttack; but in 1191 B. S., when the country was measured and settled by Government, the land in question was recognised as *dewutter* and *lakhiraj*, as was proved by the report of the settlement, the *Fussul char* and other papers. In 1206 B. S. the land was divided between the plaintiff's father and his three uncles. Those four persons held their respective shares separately. As the three uncles happened to be on bad terms with the plaintiff, and on friendly terms with the defendants, it was not to be expected that they should cooperate with the plaintiff on this occasion.

The defendants rejoined that, from certain papers in the Collector's office, and from copies of the *sunnuds* issued by the Commissioners appointed to make the settlement for the lands in question, it would fully appear that the estate was not *lakhiraj* as asserted by the plaintiff.

On the 28th of May 1813, the Acting Assistant Judge passed a decree for the plaintiff with costs. On appeal to the Calcutta Provincial Court a review of judgment was directed, on the ground that the Assistant Judge had not sufficiently enquired into the leading circumstances of the case.

It came subsequently before the Judge of the Zillah Court of the suburbs of Calcutta, owing to an alteration in the jurisdiction. In this Court a decree was passed for the plaintiff with costs. Meane profits were not awarded. Odey Chaand Mundul, one of the defendants, appealed from this decision to the Provincial Court of Calcutta, where, on the 20th of September 1821, the Second and Third Judges reversed the Zillah Judge's decree. It was necessary, the Court observed, by section 27, regulation 19,

1793, and section 19, regulation 8, 1800, that mention of *lakhiraj*¹⁸²⁶ lands should appear in the Collector's records; in the present case no such mention appeared, neither could the respondent produce any *lakhiraj sunnud*.

The plaintiff petitioned the Court of Sudder Dewanny Adawlut for a special appeal, which was granted by the Second Judge (C. Smith) who recorded his opinion for reversing the judgment of the Court below, for the following reasons: He considered that the land in question had belonged to Ram Ram Dey, grandfather, and Gokul Chund Dey, father of the appellant; that they held it as *lakhiraj*, and that they were ousted by the respondents. He put no faith in the papers produced by the respondents to prove that the land was liable to the payment of *jumma*; since they themselves had, in their reply, allowed that it was entered as *lakhiraj*, from 1190 B. S. The Court of Appeal had reversed the Zillah decree, and given one in favour of the respondent on two grounds; one, the nonproduction of the *sunnud*, and the other the non mention of the lands in question in the Collector's books. But the absence of the *sunnud* (since it may have been lost) is not, under regulation 19, 1793, a sufficient cause for rejecting a claim to a *lakhiraj* tenure, if any other good evidence in support of the claim can be adduced. From the documents put in it fully appeared that, in the year 1209 B. S., the land in question was entered as *dewutter* in the Collector's books, and further, that the respondents had allowed this to have been the case in their reply filed in the Court of Appeal, when the cause was first before that Court. When the case came again before the Court of Appeal, after the review of judgment, and was then decided, a reply was not filed and a decree was passed by that Court without reference to the statements contained in the reply filed in the first instance. Lastly, the appellant appeared to have held possession of the land since the time of the Zillah decree according to which he obtained it. On the above grounds, the Second Judge was of opinion that the decree of the Provincial Court should be reversed and judgment given for the appellant with costs.

The Fifth Judge (A. Ross), on the 19th of April 1826, recorded his opinion that, of the land in dispute, fourteen beegas, six biswas, were made subject to the payment of revenue in 1209 B. S. and three beegas, two biswas, in 1211 B. S. It did not appear that any record of the land being *lakhiraj* was entered in the Collector's books as required by section 25, regulation 19, 1793. As he (the Fifth Judge) was inclined to suspect the authenticity of the signatures of the officers of Government affixed to the document called the *bazar zamaan duster*, that document, which was filed by the appellant in the Sudder Dewanny Adawlut, did not suffice to alter his opinion on the merits of the case; since it further appeared that the document alluded to was put into the Collector's office during the time of the proclamation or notice, which, agreeably to regulation 8, 1800, was affixed in the Collector's Cutcherry. He considered the plaintiff's claim not proved, and that the decision of the Court of Appeal should be affirmed with costs. He added, that by section 30, regulation 2, 1819, the plaintiff was at liberty to bring his action *de novo*.

1826.

Ram Pershad Sirkar, v.
Odey Naraian Mundul and others.

The case having next been brought before the Chief and Fourth Judges (W. Leycester and W. Dorin) they saw no reason, after mature consideration, to interfere with the decree passed by the Court of Appeal. The appellant had no *sunnud* to produce; whereby to substantiate his claim, nor was there proof of his having held the lands as *lakhiraj* since 1765. It was doubtful whether any statement of the land being *dewutter* was put into the Collector's office at the requisite period, as prescribed by regulation 19, 1793, and regulation 8, 1800, nor did the Court see that any mention of the circumstance was to be found in the proceedings at the commencement of the suit. The statement of the appellant was, on the other hand, entirely against the supposition of such having taken place, and it appeared highly probable, that the appellant or his ancestor, at the time while farmers of the land had fraudulently attempted to represent it as *lakhiraj*, as it was evident that near twelve years previous to the institution of the suit, or rather from the time of the purchase made by Manik Mundul, the rents had been collected from the land in question, and regularly paid as from other lands subject to the payment of *jumma*. The document produced by the appellant called a *fussul char*, dated 1787, and apparently bearing the initials of the Collector and the seal of his office, did not suffice to prove the land *lakhiraj*, because the Collector never had the power to grant such *sunnuds*; and, if such signature was authentic, it must have been affixed by an oversight on the part of the Collector, or by means of a fraudulent representation made to him by one of the parties.

A decree was therefore passed dismissing the appeal, and affirming the judgment of the Court below with costs.

1826.

SHEO SURRUN MISSER (Son and heir of SINGH LAL alias DURIAO MISSER, deceased) Appellant,

May 27th.

versus
SHEO SOHAI, Respondent.

Sale of joint landed property, situated in the district of Mirzapore, by one partner without the consent of the rest, being contrary to the Hindoo law.

THIS was an action brought by Sheo Surrun Misser against Sheo Sohai, to recover possession of two mouzas situated in zillah Mirzapore, pergunna Afoura.

The suit was instituted in the Dewanny Court of Mirzapore on the 4th of February 1819, and laid at Rs. 1670; three times the yearly *jumma* of the land.

It was stated in the plaint, that the land was sold by the defendant to the plaintiff on the 29th of June 1816, for Rs. 2601. The defendant first gave a *kutkubala*, and afterwards executed an *akarnama* to the effect that the sale was complete. This obligation was registered by the Register, and the defendant at two several times received from the plaintiff two instalments of Rs. 109

each. The defendant petitioned the Court to give the plaintiff possession, which was ordered, and the plaintiff was accordingly put in possession of the property, but as the defendant had a cause pending in the Provincial Court of Benares respecting certain profits from the above mouzas, he executed a written undertaking binding himself, when the cause should be decided, to give a complete deed of sale for the mouzas to the plaintiff, and to effect the substitution of the plaintiff's name in the Collector's books, on which he was to receive from the plaintiff Rs. 1601, in further payment of the purchase money, and to give up all right and title to the property. Further, he declared, in the same obligation that should he fail to give a deed of sale as agreed upon, the obligation itself should be considered as a deed of sale, and have all the virtue of such a deed. The Provincial Court of Benares had passed a decision in the cause above alluded to, and the defendant had received at different times different sums of money from the plaintiff, namely, Rs. 144 at one time, Rs. 302 at another; at one time golden ornaments worth Rs. 75, and at another time Rs. 24; altogether Rs. 545. But now he refused to take the rest of the purchase money, viz. Rs. 2056, and was about to oust the plaintiff from the estate.

The defendant, *in formd pauperis*, replied that the land was worth more than Rs. 5000, and was the joint property of his father and his four uncles. Had he wished it, he could not have alienated the land during their lives. He never executed any *kutubala* or written obligation, such as described in the plaint. He never received any of the sums spoken of by him, nor petitioned the Court to give the plaintiff possession. The real case was this: he was at a loss for money to pay the Government revenue for the year 1224 F. S. and therefore executed a written obligation of the nature of a mortgage deed, pledging the land for the sum of Rs. 1000, on the following conditions. The plaintiff was to enter on possession, and he (the defendant) failing payment of the Rs. 1000, was to execute a bill of conditional sale (*bye-bil-wuffa*) for Rs. 2001. The plaintiff also executed an *ikrarnama* to the effect that he would give the defendant *nankar* at Rs. 100 per annum, so long as the mortgage endured, and that he would relinquish the estate if the money was paid within two years from the termination of the suit mentioned above. Of the sums, however, agreed upon in the *ikrarnama* aforesaid, he had paid nothing but the arrears of rent amounting to Rs. 385. The *malgoozaree* from Assin to Asark 1224, was paid by the defendant.

In 1225 F. S. the plaintiff got possession of the profits of the land, to the amount of Rs. 1375, of which he paid Rs. 557 Government revenue, and kept the rest. He also got hold of Rs. 715 on account of instalments from the ryots due from Assin to Asark 1224 F. S. before the date of the *ikrarnama*, and consequently the property of the defendant; thus he possessed himself of Rs. 1533 besides the income of the year 1226 F. S.

Bishuster Dial and Rughoo Dial, two witnesses in this case, deposed that the decree gained by the defendant in 1789, for the mouzas in dispute, was merely nominal, his father being the real plaintiff; and that the defendant had no power to alienate the land,

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as it belonged to his father and his four uncles, of whom the witnesses were two; a copy of a decree passed by arbitration on this subject on the 11th of September 1813, was put in. The Sheo Sur-
ra Masur, Officiating Judge of the Zillah passed a decree in favour of the plaintiff with costs, directing the plaintiff to pay the defendant Rs 2056, the rest of the purchase money. The defendant appealed, in *formā pauperis*, to the Provincial Court of Benares, where the following judgment was given by the First, Second, and Officiating Judges. "We think the appellant did (as he affirms) make over possession of the estate to the respondent after the manner of a mortgage; because there was nothing in the decision of the case where he was concerned as plaintiff in this Court respecting the profits of the estate, which could have forced him necessarily to sell it to the respondent. We do not agree with the Judge of the Zillah Court in considering that the decree by arbitration produced as evidence on the part of the appellant, is a forgery, because it is dated in 1813, and written on stamp paper of that period, and not on paper which came into use by regulation I, 1814. Besides, the appellant is not sole proprietor of the land, since it appears by the statements of Bishustur Dial and Rughoo Dial that they had an equal property in the estate, which was jointly possessed by five partners; therefore if it had been proved that the appellant had sold the land to the respondent, such proceeding would have been invalid as being against the consent of the other partners, and proprietors; with respect to the point of the *kutubata* and *ikrarnama* no complete proof was brought. Budha Lal was the witness whose testimony supported the first, and Changes Ram came forward to establish the second document. Budha Lal did not however appear to know the appellant's handwriting, though he affirmed that he did; although it has been collected from the witnesses that the appellant received from the respondent Rs. 1549, yet it has not been proved that the appellant ever agreed to sell the estate. Sale is not complete till the purchase money is all paid; but the respondent may bring an action against the appellant for the money he has paid, and the appellant against the respondent for the profits which he can prove the respondent to have received from the estate. But the appellant's father being alive, he (the appellant) had no right or power to alienate any part of the land, and all the deeds executed with that view, or to that effect, are invalid. We therefore reverse the decision of the lower Court, and give a decree for the appellant with costs." From this decision the case was brought by special appeal into the Sudder Dewanny Adawlut. The appeal was admitted on the 17th and 21st of April 1823.

The Chief and Fourth Judges of the Sudder Dewanny Adawlut (W. Leycester and W. Dovin) on the 27th of May 1826, recorded their opinions as follows: The Hindoo law, as laid down in *vyn-*
avasthas delivered in former cases (a), does not permit alienation of land, held jointly by several *pustekars*, or owners, to be made by one without the assent of the others; nor indeed does such aliena-

(a) See Civil Reports, page 333, vol. 8, and page 71, *et passim*, of the present volume. The same doctrine was also maintained in a *Tirhoot* case wherein Raja Bydhanup was appellant, *versus* Jyottir Jha and others, respondents. The pandita *shee* also held the sale of joint undivided property to be invalid, without the assent of all the sharers, and not valid even for the sellers own share, while undivided.

You hold good for the alienating partner's individual share even, without the assent of the rest. It is not in the present case, sufficiently shown that the partners had consented to such alienation, as the appellant has attempted to prove. And even had their assent been shown, there was such evident overreaching on the part of the appellant, that the Court could not hold the transaction valid, though at the same time the respondent was clearly bound to refund to the appellant the money he had received, with interest. For these reasons the decree was affirmed with costs.

NOOR JEHAN BEGUM, Appellant,

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versus
PREM SUKH, (Agent of Mr. SWEEGLAND), Respondent.

June 6th.

THIS was an action brought by Prem Sukh, (agent to C. Sweedland, Esq.) on the 9th of February 1818, in the Dewanny Court of Zillah Tirhoot, to recover from Noor Jehan Begum, widow of Moulogee Mihr Ali, son of Syud Ali Khan, the sum of three thousand rupees (Rs. 3,000) principal and interest, on account of money lent to the deceased Mihr Ali.

It was stated in the plaint, that Moulogee Mihr Ali, on the 1st of December 1813, borrowed from Mr. Samuel Deane, (agent of Mr. Sweedland aforesaid) the sum of Rs. 2,500, which, together with interest, amounted on the 31st of July 1814, to Rs. 2,674. 13. 1., of which, up to October 31st, 1814, Rs. 501, had been paid by assignment of certain lands belonging to the deceased, who died on that date. The defendant, who had succeeded by inheritance to the property of the deceased, was now liable for the remainder of the debt: a refusal therefore to discharge the amount, now Rs. 3,000, by accumulation of interest, had led to the institution of the present suit. The defendant did not appear to reply.

The Officiating Judge of the above mentioned zillah, considering the debt proved by the evidence of the witnesses to the bond, as also the inheritance of the debtor's property by the defendant, and observing that the defendant had suffered judgment to go by default, gave a decree for the plaintiff, with costs.

The defendant appealed from this decision to the Patna Court of Appeal, and put in a statement to the effect that, what property she possessed had been left to her by her father Syud Ahmad Ali Khan, but that she had no property left her by her husband, since all his estates had been assigned to Bahoo Byj Nath Sahoo for payment of certain debts, and that when she was sued in the Patna Court of Appeal on a former occasion for certain debts, contracted by her late-husband, the Court did not recognize the claim, because she had inherited no property from her husband.

The respondent answered, that Mihr Ali had become possessed of the property left by Syud Ahmad Ali to his widow and daughter,

1826. by virtue of deeds executed by them in his favour, and that his name was entered in the Collector's books as proprietor of the Noor Jehan same.

Begum, v. Prem Sakh. The Officiating Judge of the Patna Court of Appeal gave a decree in favour of the respondent with costs.

The appellant petitioning for a special appeal in this Court, it was granted, because the above decree differed entirely from that in the case of Ujeet Sing *versus* Noor Jehan Begum from the same Court.

On the appeal, the Second Judge recorded his opinion, that it was not proved that the appellant had inherited any of her husband's property, the deed of gift said to have been given by the appellant to her husband proving, on examination, to be nothing more than a 'mokhtarnama'. The Second Judge remarked that, he did not consider the widow liable for the debts of her deceased husband, from whom she had inherited no property, and therefore recorded his opinion that the decrees of the two lower Courts should be reversed with costs.

The Third Judge concurring in this opinion, the decrees were reversed accordingly.

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GOUR CHUNDER RAI, and others, Appellants,
versus

June 20th. **HURISH CHUNDER RAI, and others (heirs of JUGGUT CHUNDER RAI, and others) Respondents.**

In the case of an undivided Hindoo family, their acquisitions will be presumed to have been joint till proved otherwise; the *onus probandi* resting with the party claiming exclusive right.

THIS suit was instituted in the Zillah Court of Dacca Jelalpore, on the 16th of April 1814, by Nubkishen Rai (father of Gour Chunder Rai and the other appellants) against Govind Pershad Rai and Raj Narain Rai, to recover a half share of the *turruf* of Bhatoee Doba, the yearly produce of which was estimated at Rs. 1031.

It was set forth in the plaint, that two brothers Odey Narain Rai and Roop Narain Rai, the father and uncle of the plaintiff, lived together as an united family on the income arising from their paternal property, and from certain other property acquired by themselves, and that in the year 1207, they privately purchased the *turruf* of Bhatoee Doba, the pargunna of Gunga Put and Golajy Nugger, under the name of Muddoosoodun (another name for the defendant Rajnarein) from Kishen Mohun the former *ta-lookdar*. In the year 1208, some part of the property above-mentioned, viz. the pargunna of Gunga Put, was sold by auction for arrears of revenue, and was purchased by the plaintiff Nubkishen Rai under the name of Raimund Bose, for Rs. 5000, the purchase being effected by a *gomashla* of the parties, by name Lukeekasut Bose, and the money being raised upon the sale of Golajy Nugger to Mouloree Ali Nukse, and by loan afforded by him

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to the said Nubkishen (the plaintiff); at the same time a deed of sale and bond were executed by the said Nubkishen under the name of Muddoosoodun to Rajnarain Rai, one of the defendants who was the *gomashta* of both parties. After the death of both the brothers, which occurred in 1814 and 1816, the plaintiff (son of one brother) continued living with the defendant Govind Pershad (son of the other brother). The latter however in 1219 B. S. having by intrigue procured from the defendant Raj Narain Rai a bill of sale for Bhatoee Doba in his (Govind's) name, presented to the Collector's office a petition for the entry of his name as sole proprietor thereof. A counter petition was filed by the plaintiff, and the Collector directed the parties to try the case at law: hence the present action. For the defendant, Govind Pershad Rai, it was stated in reply, that no partnership ever existed between Odey Narain Rai and Roop Narain Rai, as regarded the land in dispute, for that the latter purchased with his own money the estate, and securing all the rights and privileges of a sole proprietor, was so to all intents and purposes, up to the time of his death, when the estate hereditarily descended to Govind Pershad his son and heir, whose it then was; that he could produce the bill of sale to shew that the estate never was purchased jointly, but by one person.

The defendant, Raj Narain Rai, replied on his part that Gunje Put, Bhatoee Doba and Golajnuggur were purchased by him for the use and with the money of the defendant Govind Pershad, under his alias of Muddoosoodun, from the former *talukdar* Kishen Mohun. The plaintiff had no concern whatever with it. The statement of the plaintiff with regard to the auction purchase was altogether untrue, for the purchaser was Govind Pershad Rai through the defendant Raj Narain, and under the name of Baman-nund Boss; the money for the purchase being raised by the sale of Golajnuggur to Mouloves Ali Nukes effected by him, the defendant Raj Narain Rai.

The parties produced a great variety of documentary evidence and a number of witnesses to support their respective allegations as to the estate of the family at the time the purchase of Bhatoee Doba was made, and the source from whence the purchase money was defrayed. The Judge of the Zillah decided, on the 4th of December 1818, in favour of the defendants. He did not consider that the fact of partnership having existed was made out by the documents filed for that purpose by the plaintiff; while the statements of the defendants were borne out by the bill of sale signed by Kishen Mohun, the acknowledgment signed by Muddoosoodun and the other papers and documents filed by them in the case. On appeal to the Provincial Court of Dacca, this decision was affirmed by the First Judge of that Court, who considered that Govind Pershad had bought with his own money, in the name of Muddoosoodun alias Raj Narain Rai, the land in dispute. He therefore dismissed the appeal with costs.

The appellants (their father Nubkishen having died in the interim) filed a petition for a special appeal in this Court, which was granted on the ground that the sole proprietorship of the land in question by Govind Pershad, though recognized by the

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Courts below, was not made out satisfactorily by the evidence on the case, and that there appeared to be some doubt as to whether Raj Narain and Muddoosoodun were one and the same person.

The Second Judge (C. Smith) went into the merits of the case on the 18th and 20th of March 1826, and recorded, as the result of his investigation, the opinion that a partnership had existed between the parties with regard to the land in dispute; that is, that the land was purchased jointly by the two brothers under the name of Muddoosoodun as stated by the appellants; that after the death of both brothers, Govind Pershad Rai had, jointly with the claimants, entered on possession of the land, from which he subsequently by violence ousted them; that it was of no consequence whether Muddoosoodun was or was not the same person as Raj Narain, inasmuch as it had been proved that the purchase money of the land in dispute had been defrayed from the joint property of the two brothers. He therefore recorded his opinion, that the decrees of the lower Courts should be reversed.

The case next came to a hearing before the Chief and Fourth Judges (W. Leycester and W. Dorin) who coinciding with the Second Judge recorded their opinion to the following effect:

"It is evident that the *turruf* in question was acquired during a time (1207 or 1208) in which the family were living together in an undivided state, and in the life time of Odey Narain Rai and Roop Narain Rai, ancestors of the parties. Under these circumstances it must be assumed to be a joint acquisition from joint funds until the contrary is shown. There is no sufficient proof either from the testimony or presumption of the case in favour of separate acquisition by the separate industry or funds of Govind Pershad, or of his having amassed the means of acquisition elsewhere. The circumstance of his having been the manager is no proof of exclusive right or exclusive possession. The same happens every day in Hindoo families without either being alleged."

Judgment for appellants with costs in all three Courts.

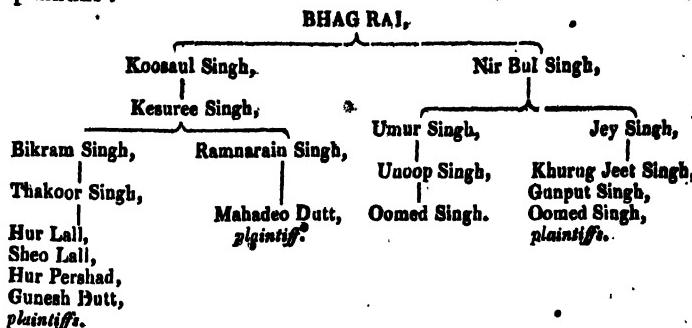
SUDA SHEO SINGH and others, Appellants,
 versus
 HUR LALL SINGH and others, Respondents.

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June 29th.

THE respondents were plaintiffs in an action brought on the 2nd of February 1809, in the Zillah Court of Tirhoot, against Manik Singh, ancestor of the appellants, claiming to recover a share consisting of 18 anas, 6 gundas, 2½ cowries, of mouza Akburpore, a Nizamut mehal, in pergunna Milkee. Suit laid at Rs. 925. 13. the yearly produce of the estate.

The following genealogical sketch of the family was filed by the plaintiffs :



Bhag Rai Singh, according to the statement of the plaintiffs, was the founder of the family, and from him the estate had descended without division to his heirs, who had, up to the year 1194 F. S., held it jointly. The concerns of the estate were carried on in the name of Bikram Singh. At one period Meer Zoolfcar Ali, who was mokurrereedar of the whole pergunna of Milkee, had the management of the mouza of Akburpore in his own hands, and he used, in place of paying to the above proprietors their regular malikana, to allow them portions of land to cultivate rent free; the regular receipts for malikana, when paid in money out of the jecting Collector's office, were signed, sometimes by one of the plaintiffs, and sometimes by the defendant. A copy of that for 1803 was in the plaintiff's possession; the rest of them were in the hands of the defendant. In the year 1181 F. S. the defendant's name appeared with those of the plaintiffs as defendants in a suit instituted against them by one Hindoo Put, and in which a decree was obtained by the latter in the Court of Zillah Tirhoot. In like manner, in the year 1202 F. S., on a second suit by the same Hindoo Put, the defendant and the plaintiffs jointly executed a mekhturnama empowering Chutter Singh (son of Manik Singh) to appear for them and carry on their defence. Further, in the year 1206 F. S., when a settlemeat for five years was made with the Collector, and an engagement was entered into by the defendant (with the consent of the plaintiffs) he, the defendant, signed as one of the sharers. Again, when the mouza was taken under the management of the Collector, in the year 1211

A decree having been passed by the Patna Provincial Council for the restoration of an estate (which had been illegally sold) to one member of an undivided Hindoo family, on repayment of the purchase money, and it being presumed that the right of other branches of the family had always been kept alive, their respective shares were decreed to them without sub-payment of any part of the purchase money, which, it was presumed, had been defrayed out of the produce of the joint property.

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F. S., it was entered in his books as the property of Manik and others. Thus, from the year 1205 to 1210 F. S., the plaintiffs had received assignments of land in lieu of *malikana*; from the year 1211 to 1218 F. S., they had received *malikana* in money from the Collector, and though, after that date, namely from 1214, when the mouza had been let in farm by the Collector, the plaintiffs had not received *malikana*, yet they had received all the other dues of proprietorship regularly. The present suit was brought on an order of Court directing the parties, which order had been passed when the plaintiffs petitioned for a precept to the Collector for the entry of their names as proprietors; Manik resisting the entry. The defendant replied by denying the foregoing statement, and by alleging that the claim was altogether unsound. Bikram Singh, the defendant maintained, had formerly sold the estate to make good arrears of revenue, without the leave or knowledge of the defendant or of Ram Narain Singh the other sharer. Dookh Bhunjun was the purchaser, and he sold it again to Jungul Singh. The defendant exerted himself to get the purchase set aside in the Patna Council, and succeeded, on the ground that it had taken place without the knowledge of himself and Ram Narain. He (the defendant) then paid the purchase money, namely, Rs. 437, and got back the property and the bills of sale: since which time he had been constantly in possession of his own share by virtue of inheritance from his grandfather Bhag Rai, and also of the shares of Bikram Singh and Ram Narain by virtue of his purchase. As to the plea relative to the suit brought by Hindoo Put, it could not benefit the plaintiffs claim, because, at that very time, they (the plaintiffs) executed to the defendant a written acknowledgement renouncing all claim to the property, on condition of his erasing their names from the list of defendants, which he accordingly did. The defendant's name alone was to be met with in all the papers, whether relative to the management of the suit in Court or to the estate itself. The defendant proceeded to deny all the pleas contained in the plaint concerning the land given for *malikana*, his name being entered in the engagement as *sharer* only, and their participating in the proprietary rights. He stated that they never gave the Collector receipts for *malikana*, and that they could shew no document in their favour so conclusive as that which he was able to produce on his part, namely, the settlement for the estate made in his name by their consent. The words "and others" were not inserted in the Collector's records, or, if they were to be found there, it might be ascribed to the collusion of the *Omla* of the Collector's office, the duties of which were formerly conducted in a very careless manner. Why had the plaintiffs not sued the other descendants of Bhag Rai? They had mentioned, only two sons of the said Bhag Rai, when in reality there were eight. The descendants of six of these were alive and in possession of their shares, yet he alone (the defendant) was proceeded against. Finally he appealed to the decree of the Patna Council for full corroboration of his claim and statements. The plaintiffs rejoined that Bikram Singh had, by the tyranny of the ruler of that period, been constrained to sell the mouza in question, and, being old and infirm, and unwilling to enter personally into the trouble of a law suit, had

deputed Manik Singh and Gunput Singh to conduct the proceedings for him in the Patna Council; by which restoration of the mouza was obtained; as Manik was the ostensible person in the suit, his name appeared on the records; Bikram Singh had the keeping of the deeds of sale and the decree till his death in 1195 F. S., when they fell into the hands of Manik. If the deed of renunciation mentioned in the defendants reply had been really in existence, he would have long ere the present time, produced it: lastly, the other descendants of Bhag Rai were not sued, because they had been for a long time separated from the rest of the family.

The Assistant Judge of the Zillah Court, on the 27th of March 1814, gave a decree for the plaintiffs with costs. He considered that the evidence went to prove the receipt of *malikana* by the plaintiffs, and that if the plaintiffs had no claim to or concern in the estate, their names would not have been included with that of the defendant, as defendant in the suit instituted by Hindoo Put. If the deed renouncing all claim to the property, as mentioned in the reply, had really been executed by the plaintiffs, Manik would never have made them parties to the *mokhtarnama* executed on the occasion of the second suit instituted by Hindoo Put. The fact of the name of Bikram Singh being in the list of proprietors of the mouza in the year 1195 F. S. and filed in the Collector's office, was strongly in favour of the plaintiffs claim. He saw no necessity for examining the witnesses produced by the defendant.

From this decision an appeal was made by the surviving heirs and representatives of Manik Singh (who had died in the interval) to the Provincial Court of Patna. On the first hearing, the appeal was dismissed on account of the appellants neglecting to file a rejoinder in the space of a week; but subsequently, by order of the Sudder Dewanny Adawlut, that dismissal was set aside, and the case gone into by the First and Third Judges of the Provincial Court, on the 29th of January 1822, who recorded their opinion, that there was nothing in the facts proved sufficient to invalidate the plaintiffs claim. The deed of renunciation produced by the appellants, and stated to have been executed by the respondents, bore the name of only one person as witness to it; while it was proved that Manik Singh and the respondents were jointly concerned as defendants in a suit instituted by Hindoo Put against them; and that in 1201 F. S. the respondents and Manik Singh jointly executed a *mokhtarnama* on the occasion of another suit instituted by the same Hindoo Put. If Thakoor Singh, Khurnejit Singh and Anoop Singh had formally renounced all claim to the property, there would have been no necessity for them to have replied to the above suit, or, if they had replied to it, under those circumstances, it was natural to conclude that they would have denied, in their reply, all concern in the property in dispute. Though it was not clearly proved that they (the respondents) had regularly received *malikana*, yet there was nothing to show that their right in the property had ceased. A decree was for the above reasons passed in favour of the respondents, who were ordered to pay to the appellants their share of the sum of Rs. 437, the amount paid by Manik to recover the mouza which had been sold to Jangal Singh. Costs by the respective parties. The appellants petitioned

1816. the Court of Sudder Dewanny Adawlut for a special appeal, which was granted on the grounds of the long time which had been suffered by the plaintiffs to elapse before they brought the action, the circumstance of the Zillah Judge not examining the witnesses produced by the defendant, and the decree obtained by him in the Patna Council.

The case came to a hearing before the Chief and Fourth Judges (W. Leycester and W. Dorin) on the 20th of June 1826, when judgment was passed to the following effect. "It is sufficiently clear that this mouza was the hereditary property of the family, and the presumptions arising from the depositions and documents is that the right has been kept alive, and that all have still a right to come in as sharers. The Collector's records to a late date, show that Manik was not the sole owner, but had partners, though he was the one put forward. The circumstance of others of the family being joined with Manik in the boundary suit of 1192 is a strong fact for the plaintiffs; as is also the *mokhtarnama* of 1201. Against the presumptions hence arising, the Court cannot infer that the retrieval, in virtue of the order of the Patna Council in the year 1774, (corresponding with the *Fuslee* year 1183) was by Manik alone. The probability is, that it was effected by means of joint funds drawn from the proceeds of the mbuza. The claim therefore is adjudicable. The decrees of the Courts below should be affirmed, excepting so much of the decree of the Patna Provincial Court as directs the payment to be made by the respondents to the appellants of a proportionate sum of the purchase money, against which the respondents had protested, and which, from the presumption of the whole purchase money having been defrayed from the joint funds, it is not considered equitable to enforce."

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MEERZA MOOHUMMUD ALI, Appellant,

versus

NUWAB SOULUT JUNG, and others, Respondents.

June 27th.
In the absence of a bill of sale for landed property and receipt for the purchase money, the Court of Sudder Dewanny Adawlut held it necessary, that the fact of sale should be

THIS suit was originally instituted by the appellant, in the Patna Provincial Court, against the respondents, on the 25th of September 1820, to recover the bill of sale and possession of *mehal* Bhooee, consisting of ten assessed villages in pargunna Bisong, zillah Behar. The suit was laid at Rs. 11,400, three times the annual produce.

The plaintiff set forth, that Nuwab Dilawar Jung, in the year 1220 E. S., sold the above *mehal* for the sum of Rs. 14,500 to the plaintiff, who was the friend of his younger son Nuwab Musheer Jung, and on receiving the whole of the purchase money, presented him with an *umuldustuk* or order for possession, accompanied by a *purwanna* addressed to his *mokhtar*, Abdool Ali, and that he, on receipt of them from the plaintiff, (who happened to be proceeding to Patna at his master's desire, to

conduct the cause of Mussummaut Anwar Begum, wife of Hajee Yakoob Khan, then pending in the Court, sent Sirdharam to put him in possession. The plaintiff removed the old and appointed new officers, continued in possession from Ascot to the 25th of Sawan 1223 F. S. inclusive, and paid the rents to Government exclusively and uninterruptedly. The Nuwab Dilawur Jung, in reply to the plaintiff's letter, requesting the bill of sale and other papers, promised to send them afterwards, and forwarded a *mokhturnama* (executed in the name of Soulut Jung) in consequence of the *mehal* having been ostensibly purchased under that name,) addressed to Ilahhee Bukhsh and signed by the Judge of City Moorshedabad, setting forth, that "he had sold it and received the purchase money" with the view to facilitate the substitution of the plaintiff's name in the room of that of Nuwab Soulut Jung as proprietor. Towards the end of Sawan 1223 F. S. the defendant Jetee Singh came with a large party into the *mehal*, representing Puhlad Singh to be the *gomashta*, and Heorul Singh the *putwari* sent by Ilahhee Bukhsh, the *mokhtar* of Nuwab Soulut Jung, dispossessed the plaintiff's *omlah*, and forcibly carried away his property, papers, &c. On the plaintiff's complaining in the Criminal Court, from which his case was made over to the Civil Court, under regulation 6, 1813, the Acting Judge passed an order on the 26th of December 1816, confirming the Nuwab Soulut Jung in possession of the *mehal* in dispute, and on an appeal the decision of the Zillah Judge was upheld, and the plaintiff referred to a regular civil suit. He accordingly now sued for possession of the villages in dispute, to which he was entitled in right of purchase, and from which he had been unjustly ejected by the defendants.

Nuwab Soulut Jung and Ilahhee Bukhsh (who were the only defendants that appeared to plead) replied as follows:

No credit should be attached to the plaintiff's statement relative to Nuwab Dilawur Jung having sold the *mehal* in dispute consisting of ten villages (there are in fact only five villages) to him for Rs. 14,500, and given him an order for possession; for the plaintiff (whose real name is Alfoo, but who is styled by courtesy Meerza Moomummud Ali), was originally a *khidmutgar* with a salary of Rs. 2. 8, a month, in the service of Abdool Kasim Khan, a servant of Nuwab Dilawur Jung, and, having subsequently held several menial offices, at last entered the service of the defendant's brother Nuwab Musheer Jung as *khansaman*. He never had funds to purchase the *mehal* in question, nor was Dilawur Jung empowered to sell it, Government having concluded a settlement for it in 1207 F. S. with him (Soulut Jung) as *malik*. It was also very improbable that the purchaser instead of receiving, as is usual, the bill of sale, receipt for the purchase money, &c. should pay the purchase money on obtaining merely an order for possession. The fact was, that in consequence of the suit of Anwar Begum, wife of Hajee Yakoob Khan, *versus* Meer Moomummud Bakir Khan, the person in possession of the late Hajee's estate, his (the defendant's) brother, Musheer Jung, at the request of Anwar Begum and Dilawur Jung, sent the plaintiff, Noor Ali, and others of his servants to Patna, for the purpose of com-

1826. ducting the Begum's cause. He (Soulut Jung) relinquished the *mehal* in dispute to the management of his brother, in order that its proceeds might be applied to cover the expences of the suit; and received, by way of precaution, from the plaintiff, an *ibrar-sama* or written deed of acknowledgment, setting forth that the above *mehal* was the property of Soulut Jung; that the plaintiff was the agent of his brother abovementioned; that the proceeds of the estate were placed under the plaintiff's management, and were intended to defray the expence of the Begum's suit, and that the surplus proceeds remaining after the expences had been defrayed should be sent, with the accounts, to his (the defendant's) brother.

Accordingly, the plaintiff, in conformity with the engagement specified in the above deed, transmitted to his brother the balance remaining after defraying the necessary expences, together with vouchers, petitions, *jummabundes* and other papers. In consequence of the plaintiff's extortion being discovered, subsequent to his (the defendant's) brother's death, and his failing to attend, although summoned and served with *purwannas*, he was removed from his situation, and Hahee Bukhsh was appointed to manage the estate and receive charge of the *wasilaut* accounts from the plaintiff. On an investigation taking place (when the plaintiff sued in the Criminal Court and his cause was transferred for decision to the Civil Court, under regulation 6, 1813, and there dismissed) it appeared that the plaintiff executed with his own hand an *umuldustuk* on unstamped paper, and a *purwanna* purporting to be from Nuwab Dilawur Jung, directing him (the plaintiff) to be put in possession and addressed to his *mokhtar* Moulovese Abdool Ali, reciting that the *mehal* in dispute was in reality purchased by Nawab Musheer Jung, and that the *umuldustuk* and *purwanna* merely specified the purchaser's fictitious name, presented it to Moulovese Abdool Ali, and obtained from him a letter to the ryots and *omlak* of the estate: that he fraudulently obtained the signature of the Moorshedabad City Judge, and the attestations of persons purporting to be by name Peer Moohummud and Moohummnd Hingun, without any specification of their condition or place of residence, to a *mokhtarnama* alleged to have been executed by him (Soulut Jung) in favour of Moulovese Abbas Ali, empowering him to erase his (Soulut Jung's) name, and substitute that of his brother's son Meer Moohummud Ali as proprietor of the *mehal* in dispute; but concealed it, in consequence of a quarrel with his brother, until the death of the latter, when he produced it, having added the letters *za* to the word *Meer*, thereby rendering it Meerza Moohummud Ali; and on this transaction the present action was founded. The defence concluded by stating that the defendant Hahee Bukhsh, the *mokhtar* of Nuwab Soulut Jung, an likewise Jetee Singh (who after the decision of the suit brought under regulation 6, 1813, farmed the *mehal* in dispute); Pehlad Singh, *gomashta*, and Hoorul Singh, *putwars* thereof, had no interest whatever in the issue of the present suit.

On the 27th of May 1822, the Acting Judge of the Provincial Court, in passing judgment in this case, recorded the following:

observations : " The plaintiff is unable to produce any deed of sale, voucher, or other document, as an acknowledgement of sale on the part of the vendor, and it is highly improbable and contrary to the rules observed in transactions of sale and purchase, that the whole of the purchase money should be paid, and the purchaser seized of the property sold, before he had been furnished with a bill of sale and receipt. It is evident that Nuwab Dilawur Jung and Nuwab Soulut Jung were not so distressed for money as to be compelled to sell for Rs. 14,500, the estate in question, the annual produce of which has been stated by the witness Girdhares Lal to be twelve or thirteen thousand rupees. The documents and letter filed by the plaintiff are insufficient to prove his purchase, and cannot be considered equivalent to a bill of sale and receipt; for as many men of property in that part of the country are in the habit of entrusting their affairs and seals to their servants, and the plaintiff was an old and confidential servant, it cannot be surprising if he had affixed Dilawur Jung's and his son's seals to these documents, with the view to serve his own ends. On inspecting the *mokhtarnama* filed by the plaintiff, it appears that, in three places, where the name of Meer Moohummud Ali was mentioned, the letters *za* had been added with the design to effect the registry of Meerza Moohummud Ali's name, the letters *za* being in every instance out of line. It is clear, from letters addressed by the plaintiff to Girdhares Lal, *mokhtar*, in the cause about Banda (situated in the *mehal* in dispute), as well as from petitions bearing the plaintiff's seal, which have been authenticated by the testimony of witnesses, that the *mehal* in dispute was the estate of Nuwab Soulut Jung, that the plaintiff had sent the accounts for 1222 F. S., that he was *mokhtar* of the *mehal* and appointed to manage it, and that his statements relative to his having enjoyed possession thereof from *Asaryk* 1220, to 1223 F. S. are false. Besides which, the depositions of the plaintiff's witnesses contradict each other." Under these circumstances the plaintiff having failed to substantiate his claim, it was dismissed with costs.

Meerza Moohummud Ali appealed to the Court of Sudder Dewanny Adawlut, and Nuwab Soulut Jung, and Ilahee Bukhah alone appeared to answer the appeal; Nuwab Hoosein Jung, a third party, presented a petition, setting forth that he had a claim on the disputed *mehal*, and requesting to be admitted as a respondent, that his rights might be considered in the decision of the case.

The case came to a hearing on the 11th and 13th of March 1826, before the Second Judge (C. Smith,) who, having perused all the papers and pleadings of the parties, recorded his judgment in the following terms :

" Notwithstanding the absence of a deed of sale or receipt for the money, I am of opinion, that the sale of the *mehal* in dispute by Nuwab Dilawur Jung, to the appellant Meerza Moohummud Ali, in 1220 F. S. in consideration of the sum of Rs. 14,500, has been sufficiently established. For it appears, in the first place, that the *mehal* in question was the estate of Dilawur Jung, and that, at the time when it was bought from Rajah Ikbal,

1825. Ali Khan, the former proprietor, for Rs. 4,000, Nuwab Soulut Jung, son of Nawab Dilawur Jung had not the means of purchasing it. Secondly, it has been satisfactorily proved, that the *purwana* and *umuldustul* granted by Dilawur Jung are not forged, but genuine; that Mouloves Abdool Ali (his agent) considered them to be authentic, and, in consequence, presented the appellant with an order for possession addressed to the ryots; and that accordingly the appellant obtained and continued in possession for two years as proprietor. Thirdly, although the respondent (Soulut Jung) has stated in his reply that he received from the appellant an *ikrarnama* acknowledging the respondents and denying the appellant's proprietary right; yet he has failed to produce it. If Girdharee Lal is in possession of any document in the shape of an *ikrarnama* it can only be a copy, and a copy of which the original does not exist. Fourthly, it has in no way been proved that Nuwab Dilawur Jung, the proprietor of the disputed *mehal*, ever subsequently denied during his life time the sale alleged by the appellant, or intended to eject him from the *mehal* sold. Fifthly, the addition of the letters *za* to the word "Meer" in the *mokhtarnama* may have been made with the view to correct a clerical error, and it does not necessarily follow that the name Meer Moohummud Ali has been altered to Meerza Moohummud Ali. Sixthly, the respondent affirmed himself to be the proprietor, claimed possession, and afterwards was seized of the *mehal* in dispute, on the sole ground of his name being mentioned in the *kibala* executed by Rajah Iqbal Ali Khan, which is absurd; for his name was inserted in the *kibala* as a fictitious one. Seventhly, as Nuwab Dilawur Jung was the proprietor of the mouza, and sold it to another person, and the purchaser obtained possession through his agents, it could not be an estate left by Dilawur Jung on his death; consequently, the respondent can have no right or title thereto as heir at law. For these reasons I am of opinion that the judgment of the Provincial Court should not be upheld, and that the fine of Rs. 100, levied on Govind Pershad, a witness adduced on behalf of the plaintiff, in conformity with the order of the Acting Judge of that Court, dated the 19th of April, should be refunded, as the papers do not prove in the slightest degree that the Nazir's penda saw him the first time he went to summon him; and it is not therefore clear that he was intentionally and knowingly absent, so as to justify the imposition of the fine; nor does it appear that the Judge questioned the witness, when he did attend, respecting his absence on the previous occasion, as required by the regulations."

The case was next taken up by the Chief and Fourth Judges (W. Leycester and W. Dorin,) who recorded the following judgment:

"It is true that the absence of a bill of sale and receipt, even supposing them never to have been executed, does not render the fact of sale incapable of proof; but, in such a case, we must insist on such proof as shall place the fact beyond doubt. In the present case, according to the admissions of the plaintiff himself, no bill of sale or receipt was executed. The evidence brought to establish the actual payment of the purchase money is altogether unsatisfactory; and the documentary evidence, chiefly consisting

of papers bearing the seal of Didawur Jung, and reciting that such a sale had been made, is always liable to suspicion, when produced (as in this instance) by an alleged buyer, who was a servant of the proprietor of the vended property, to whose hands, according to a common custom, the seal may have been frequently entrusted. On the whole the Court not being satisfied with the proof to the alleged sale, affirm the decree of the Provincial Court and dismiss the appeal with costs."

The Court considering, for the reasons stated by the Second Judge, that the fine of Rs. 100 had been improperly levied from the witness Govind Pershad, directed the amount to be refunded.

**RAJAH ARMURDUN SAHEE, and (on his death) PIRTEEPUT
SAHEE, Appellant,**

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versus
SHEO DIAL OOPUDIAH, Respondent.

July 10th.

THIS case came to a hearing in the presence of the *vakels* of the parties, on the 4th of July 1826, before the Chief and Fourth Judges (W. Leycester and W. Dorin,) when all the pleadings and documents connected with it having been read, it was postponed for further consideration till the 10th of July, when the Court recorded their judgment to the following effect:

This suit involves a claim to sixty beegas of rent-free land in mouza Pokhum Bhund, talook Bank Jognes, pergunna Sidwa Jognee, zillah Goruckpore, on the ground that Shunker Sahee and Run Sahee, sons of Futtah Sahee, the former proprietor, had made them *lakhiraj* with their father's consent in 1201 F. S. Armurdun Sahee, the original appellant in this action, and one of the sons of Futtah Sahee, contended, that the lands in dispute formed a part of his share, and in reality were never rent free, and that the action having been instituted in A. D. 1820, nearly one year subsequent to the enactment of regulation 2, of 1819, the case ought, under section 30 of that regulation, to have been referred, in the first instance, to the Collector, for investigation and report, and then decided in the Zillah Court, whereas this course of proceeding had not been followed. The Court being of opinion that the Zillah Court's decree, not being founded on the forms required by section 30, regulation 2, 1819, was illegal and null, and that the Zillah Judge was not authorized in proceeding to the decision of the case without receiving the Collector's report, annulled the decree of the Goruckpore Zillah Court, dated the 29th of August 1820, and that of the Benares Provincial Court affirming the above, under date the 12th of September 1822, and ordered that the original proceedings held in the Zillah and Provincial Courts should be returned to the Goruckpore Zillah Court, and the Judge instructed to try the cause *de novo*, in conformity to the provisions of regulation 2, 1819, upon the original fees for stamp paper. The costs in the Sudder De-wanny Adawlut and the Provincial Court were made payable by the parties respectively.

1826.

BEHAREE LAL, Appellant,

versus

July 10th. MUSSUMMAUT SOOKHUN, (widow of SOOBUNS LAL, deceased, and guardian of his minor son, GOPEENATH), Respondent.

Right of redemption adjudged to the seller of certain lands, on the ground of a condition to that effect in a separate deed executed by the purchaser, though the bill of sale itself was not worded conditionally.

THE respondent's late husband Soobuns Lal, was the original plaintiff in this case and brought his action on the 5th of May 1820, against the appellant, in the Patna Provincial Court, to recover possession of talook Lodheepoor Jafira, consisting of Nizamut villages, *Uslee* and *Dakhilee*, in pergunna Nizheel, zillah Behar. The suit was laid at Rs. 9,101, the amount of the purchase money as detailed in the plaint.

The plaint set forth, that the plaintiff mortgaged the above talook for Rs. 9,001, to the defendant, on the 30th of *Sufr* 1232 A. H. corresponding to the 17th of *Magh* 1224 F. S.; and executed a conditional deed of sale and a receipt for the amount, duly authenticated by his own seal and signature, the attestations of witnesses, the seal of the *Cazee* of the city of Patna, and the signature of the Register of zillah Behar; that the defendant likewise executed an *ikrarnama* signed by himself and the Register, attested by the pergunna *Kanoongoes*, and bearing the *Cazee's* seal, acknowledging "that the sale was merely conditional and redeemable in seven years, or at the end of 1230 F. S. by the payment of the purchase money; but on failure thereof that the sale should become absolute;" that the defendant accordingly obtained possession of the talook, having previously got his name inserted in the Collector's books; that when the plaintiff became aware of the fraudulent intentions of the defendant, notwithstanding the fact that the principal of the purchase money had been realized by him with interest, and a balance was due from him to the plaintiff, he (the plaintiff) in conformity to section 2, regulation 1, 1798, and section 7, regulation 17, 1805, paid into the treasury of the Court the amount of the purchase money, and petitioned the Zillah Court to be restored to possession; in consequence of which a notification was issued to the defendant on the 16th of August 1819; and that although the defendant dishonestly denied the execution of the *ikrarnama*, the Judge having ascertained its authenticity from the records in the Register's office, passed an order, on the 1st of February, directing the plaintiff to be put in possession of the estate, and the defendant to receive the purchase money; that the plaintiff accordingly obtained possession under the above order, but that the defendant subsequently appealed from it to the Provincial Court, which Court, on the 10th of March and 21st of April 1820, annulled the order of the Zillah Judge, and directed the plaintiff to quit and the defendant to take possession of the property, referring the former to a regular civil quit against the defendant. The plaintiff, therefore, sued for possession of the talook, intending hereafter to bring an action for the surplus proceeds appropriated by the defendant.

The defendant, in reply, declared the plaintiff's claim to be wholly unsound. His defence was in substance as follows: He had never executed or given to the plaintiff an *ikrarnama* acknowledging that the sale was redeemable. In the year 1224, F. S. he

bought the talook in dispute from the plaintiff absolutely and unconditionally, for the sum of Rs. 9101, and having, as is usual, obtained a deed of sale and receipt from the plaintiff, paid the purchase money and registered his name in the Collector's office as proprietor, he had continued in possession till 1226, F. S. After this the plaintiff wished to sell the property a second time, received the sum of Rs. 12,000, from Omrao Singh and Dureao Singh, producing a forged *ikrarnama* purporting to be executed by him (the defendant) and presented a miscellaneous petition to recover the bill of sale and receipt, and to obtain possession of the talook. The first intimation he (the defendant) received of this fraudulent purpose of the plaintiff was from the notification issued by the Court to his address, when he immediately objected to the *ikrarnama* in the Zillah Court; but the Judge without attending to or taking his objections into consideration, passed an order merely on the faith of the alleged *ikrarnama* produced by the plaintiff, and ordered him (the defendant) to restore the bill of sale and other papers to the plaintiff and to put him in possession of the talook. On his subsequent appeal from the above decision, the *ikrarnama* produced by the plaintiff was declared invalid by the Provincial Court, the order of the Judge reversed, and he (the defendant) was directed to be put in possession. He further contended that the *ikrarnama* filed by the plaintiff was altogether inadmissible, for it appeared, upon the face of it, that it was not executed and acknowledged by him before the *Cuzee*; but that the *Cuzee* of the city, contrary to all rule and practice, (for the expressed consent of the seller and buyer respectively, or in case of their absence, of their attorneys duly constituted by separate powers of attorney, is necessary to the execution and revocation of deeds of sale) attested it in his (the defendant's) absence, on the verbal declaration of Ruttun and Dewan, two of the plaintiff's servants, who were neither the purchasers nor agents of the purchaser. It was surprising that the *ikrarnama* should have been deposited to by Ruttun and Dewan before the *Cuzee*, and should bear his, the defendant's, signature, for it was a fact, that he had never gone from his house to Patna from the time he made the purchase to the present day, but had received the bill of sale and receipt, and paid the purchase money, through his father-in-law Sumbhoonath, and that if the verbal declarations of persons unconcerned were admissible and sufficient to authenticate obligations, many evil disposed persons would be able to deprive others of their property on the mere assertions of two persons subject to their will.

On the 2nd of April 1823, the Senior Judge delivered his opinion to the following effect: The difference between deeds of mortgage with conditional sale, and deeds of redeemable sale is, that, in the former case, the power of redemption is stipulated in the body of the deed itself, whereas in cases of redeemable sale it is contained in a separate deed. It appears to be usual in cases of temporary and redeemable sale to strike out the name of the seller and to substitute that of the purchaser in the Collector's books. The execution by the defendant of an *ikrarnama* acknowledging the temporary sale, and dated the 17th of Magh 1224, has been established by the depositions of the witnesses called by the plain-

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1826. tiff and the registry of it by a *mohkarnama* executed by the defendant in the name of Khan Singh, bearing the same date as the *ikrarnama*, and the authenticity of which has been substantiated by the evidence of Munyar Singh and Rubum Ali, two of the witnesses to both the above deeds. It was very improbable, if the *ikrarnama* was not genuine, that the defendant should have remained so long in ignorance of its registry, and by reference to the extent of the land and the amount of assessment fixed by Government, it is probable that had the sale been absolute and unreserved the price would have been larger. He therefore passed a decree directing the defendant to yield possession of the estate in dispute to the plaintiff and pay all costs. The defendant was allowed, if he chose, to take the amount of the purchase money which had been deposited in the Zillah Court.

Beharee Lal appealed to the Sudder Dewanny Adawlut, and on the death of the respondent (Soobuna Lal) his widow (Mussummaut Sookhun) became his representative in the action on her own behalf, and as guardian of Gopeenath, the minor son of her deceased husband, in conformity to the order contained in a proceeding of the Court dated the 8th of December 1825.

The case came to a hearing in the presence of the *vakeels* of the parties before the Chief and Fourth Judges (W. Leycester and W. Dorin,) on the 27th of June and 4th of July 1826, and judgment was given on the 18th of July. The Court were of opinion, that the fact of the transaction having been a redeemable and not an absolute sale had been sufficiently made out by positive as well as by circumstantial proof, that though the form of the *ikrarnama* was unusual, yet there was the evidence of three subscribing witnesses to its authenticity as the act of Beharee Lal; and both the *ikrarnama* and the bill of sale were registered on the same day. There was no dispute, the Court observed, as to the terms of the *ikrarnama*, but only as to the existence of such a deed, which plea had been satisfactorily disproved. The Court therefore saw no reason for disturbing the judgment of the Court below, which was accordingly affirmed and the appeal dismissed with costs.

1826. **ASMAN SINGH, PHOOLEL SINGH, and KOONJ BEHAREE SINGH,** (heirs of GOORDIAL SINGH, deceased), Appellants,
Aug. 29th. *versus* **PURMESUREE SUHAEEM**, (pauper), Respondent.

In a claim for *wasi-laut*, the Provincial Court having awarded interest for

THIS suit was instituted by the respondent, in *formd pauperis*, in the Patna Provincial Court, on the 21st of December 1821, against Goordial Singh (since dead) and Durshun Singh, to recover the sum of Rs. 2,643. 1, principal of means profits realized from 127 bengas of land known by the name of Kittah Banwah, in mouza Jyntespoor Rooniab, perganna Shahpoor Munir, calcu-

Tating at the rate of 1 rupee, 8 annas, per beega, per annum, from 1209 to 1214 inclusive; and at the rate of 1 rupee, 11 annas per beega, from 1215 to 1221 F.S., inclusive, and Rs. 2,663. 15. interest thereon. Total Rs. 5,207.

The plaint set forth that the plaintiff purchased the above mouza which consisted of 400 beegas of land from the proprietors, Kullun Singh and Dhoman Lal, in the year 1204 F. S. and obtained possession, but was dispossessed by the defendants and Kullun Singh in 1209 F. S. of 127 beegas of land, known by the name of Kittah Banwah, upon which he sued them for restitution, and a decree was passed in his favour by the Judge of the district of Shahabad, on the 26th of June 1809, which was subsequently affirmed by the Patna Provincial Court on the 15th of January 1814. The plaint proceeded to state that the plaintiff regained possession of the above lands towards the end of 1221 F. S. in consequence of the decree of the two Courts, and therefore now hoped to recover the sum claimed as wasilaut from the defendants.

The defendant Goordial Singh stated in reply, that the defendant Durshun Singh purchased the land of Kittah Baawah, which consisted of ninety-two beegas from Kullun Singh in 1208 F. S. and went westward to gain a livelihood, and the above land remained as before, in the possession of Bhowany Mowar, Asaram, and Juswunt Rai, the former possessors; that accordingly, when the question of possession was agitated in the Zillah and Provincial Courts on the plaintiffs suit, they presented petitions stating that they were in possession, and the real purchasers of the above lands under the ostensible name of Durshun Singh; and he (the defendant) in consequence of Durshun Singh being still absent, pleaded in reply to the claim on the former trial, but had nothing to say to the possession of the lands; that not having appropriated a fraction of the profits realized from the lands, the claim could not lie against him; that the plaintiff ought to have brought his action for wasilaut against the persons in possession; that, moreover, the land in dispute was situated in a marsh, and was worth about two or four annas per beega, so that the plaintiff by his calculation had overestimated the value of the land three or four fold.

The defendant Durshun Singh, in a separate answer, stated that the land in Kittah Banwah had been purchased by him: that he had entrusted it to the charge of Goordial Singh when he proceeded on his journey westward, who had ever since that time continued in possession and appropriated the profits realized therefrom, and that the claim for wasilaut would not lie against him (Durshun Singh).

On the 24th of August 1822, the Officiating Judge of the Provincial Court being of opinion, from the decree passed by the Zillah Court in favour of the plaintiff on the 26th of June 1809, on proof of his having been dispossessed of the above lands by the defendants (which was affirmed by the Provincial Court on the 15th of January 1814), and from the evidence of the witnesses called by the plaintiff who had particularly specified the rates as being at two rupees, and two rupees four annas per beega, for the paid

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the whole period (13 years) during which a separate suit for the lands was depending, and interest on that amount from the date of their own judgment, the Sudder Dewan and Adawlut reversed so much of the decree as regarded that interest, and awarded the principal of the wasilaut with interest from the date of the institution of the suit for wasilaut in the Provincial Court up to the date of the Sudder Dewan and Adawlut's decree, and from that date till payment should be made.

1826. during which the defendants were in possession, and after the plaintiff had regained possession, at three rupees, and three rupees four annas, that the plaintiff had established his claim to Rs. 2,643. 1, estimating at the rate of 1 rupee per beega from 1209 to 1214 inclusive, and at the rate of, 1 rupee, 11 annas per beega, (which was less than the calculation made by the witnesses) as well as to Rs. 2,563. 15. interest thereon, altogether Rs. 5,207, and that the defendants' plea had not been substantiated by their witnesses, who had contradicted one another, passed a decree in favour of the plaintiff directing the defendants to pay equally the amount of the claim and costs, and providing that the plaintiff should receive interest on the amount of his claim, not from the date when he instituted his suit, but from the date of the decree till payment should be made.

Goordial Singh preferred the present appeal to the Sudder Dewanny Adawlut against one half of the above award, as it affected himself, and Durshun Singh likewise appealed separately in case No. 2373, against the other moiety; and on the 10th of January 1824, the respondents were allowed to answer the appeal as paupers. The appellant Goordial Singh not appearing, although served with notices, nor any of his heirs after his death, an order was passed by the Second Judge (G. Smith), on the 28th of December 1824, that if the heirs of the late appellant did not attend when the cause was brought before the Court in numerical order it should be struck off the file.

The case accordingly was brought before the Second Judge on the 23d of February 1826, and struck off the file in conformity with the above order, but was subsequently again admitted on the file by an order passed by the Second Judge on the 21st of March; the appellant parties having appeared and shewn cause.

On the 15th of July 1826, the case came to a hearing before the Second Judge, who having read all the papers and pleadings in the case, as well as in the case No. 2373, recorded his opinion that the judgment of the lower Court with respect to the principal should be affirmed, but reversed with regard to the interest; that the respondent should be awarded the principal of his claim with interest thereon from the date of this Court's decree till payment should be made by Asman Singh, Phoolel Singh and Koonj Beharee Singh, heirs of the late appellant Goordial Singh, who were likewise to pay costs; and ordered the papers of the case to be referred, with case No. 2373, for the concurrent opinion of another Judge.

The case was next brought before the First and Fourth Judges (W. Leycester and W. Dugin,) who recorded their opinion to the following effect, on the 29th of August 1826:

The respondent, who was the original plaintiff in the present action, formerly sued Goordial Singh, Durshun Singh, and Kullun Singh, in the Shahabad Zillah Court, to recover possession of the land known by the name of Kittah Banwah in mouza Jyntepoor Roonish, and obtained a decree which was affirmed on appeal. By that decree he was awarded possession of the above lands; and about eight years after, on the 21st of December 1821, (corresponding with the 19th of Poos 1229, F. G.) he brings an action

CASES IN THE SUDDER DEWANSHY ADAWHLUT

in the Patna Court to recover the amount of meane profits capitalized from these lands in the thirteen years during which the former cause was pending. We are of opinion, advertising in ~~the Provincial Court~~, the former decree and the papers filed in the present suit, that the original appellant in the present cause, and the respondent in cause No. 2873, are equally liable for the principal or thirteen years, meane profits, but that it would be inexpedient to award interest thereon, except from the date on which the present action was brought. They therefore directed the judgment of the Provincial Court, and awarded to the respondent the principal sum of Rs. 2643. 1, with interest thereon from the date on which the suit was instituted in the Provincial Court, viz. the 19th of April 1898 F. S. to the date of this decree, and likewise interest on the above whole amount till payment should be made from the date of the decree of the Sudder Dewanshy Adawlut. And as it appeared, that Goordial Singh, the ancestor of the appellants in the present action, and Durshun Singh the appellant in cause No. 2873, (who were own brothers and equally liable for the payment of the amounts due to the respondent) had conspired and colluded together for the purpose of depriving the respondent of his rights, the heirs of the late Goordial Singh and Durshun Singh, were declared severally, and jointly responsible for the amount of the above award.

The costs of the present suit were made payable by the heirs of the late Goordial Singh. (a)

MOHUN GEER MOHUNT, Appellant,

1826.

versus

RADHAMOHUN GHUTUK, (on his own behalf, and as guardian Sept. 25th. of CHUNDERMOHUN GHUTUK, minor son of the late Krasan. MOHUN GHUTUK,) Respondent.

THIS suit was originally instituted by the respondent and Kishenmohun Ghutuk, in the Calcutta Provincial Court, on the 6th of September 1819, against the appellant, for possession of a durpyee talook called Odya Kishenpoor, and sixteen other mounds belonging to Lot Kishenpoor, the annual produce being stated at Rs. 5541. 8. 17 : and to recover the sum of Rs. 2229. 1. 14, meane profits for the years 1824 and 1825 B. S. Total Recept 8530. 10. 11.

The plaint set forth, that Jugmohan Ghutuk, the elder brother of the plaintiffs, in the year 1813, B. S. while living together as an undivided family, purchased, in his name, the durpyee rights of Odya Kishenpoor, consisting of the thir-

(a) I find from a memorandum in the above case in the records of the Calcutta Court, that Dorin, the principle which guided the Court was, that in a case of long delay, interest shall not be given. When payment of debt is delayed, the Court must be guided by disinterestedness, as well as justice, and the demand has been made and followed up in due time.

1826. assessed at an annual *jumma* of Rs. 2470, for the sum of Rs. 176^t as well as Jylkisnpoor, and ten other mouzas assessed at an annual *jumma* of Re. 1577, for Rs. 119, under the fictitious name of Rambarain Mullick, from Ramdeb Singh, the *sudder putneedar* of Lot' Kishenpoor, obtained possession, and discharged the revenue in conjunction with the plaintiffs and their second brother Gourmohun Ghutuk, and died without issue in 1216 B. S. The plaintiffs and Gourmohun paid the balance of the revenue for that year to Ramdeb Singh, who, notwithstanding, himself resumed the property in question, and Gourmohun having been appointed manager and superintendent of the estate, with the consent of the plaintiffs, obtained possession under an order from the Magistrate.

The revenue for several months of the year 1218, B. S. was paid to Ramdeb Singh, and the remainder in consequence of his becoming a defaulter to Maharanee Kumulkoonwaree the zumeendar. Subsequently the whole of the rents for 1219, B. S. were paid to Ramdeb Sing, but, in consequence of his becoming again a defaulter in 1220, B. S. the whole of the rents for that year were paid into the hands of the Zumeendar, in conformity with a notice issued by the Maharanee, forbidding the payment of it to Ramdeb Singh; at length the Maharanee, with the permission of the Court, sold Ramdeb Singh's *sudder putnee* tenur to the defendant, who immediately commenced a quarrel with the view to oust the plaintiffs, and the case was made over from the criminal to the civil side of the Court, which passed an order confirming the plaintiffs in possession. The Court of Sudder Dewanny Adawlut overruled this decision, and ordered the Zillah Judge to make an investigation relative to the points at issue between the parties, as prescribed by clause 1, section 5, of regulation 6, 1813. The case came before the Judge in the presence of the plaintiffs, after the death of Gourmohun Ghutuk, and he ordered the defendant to be put in possession of the estate, on the ground that the right of the *Dur Putneedar*, or under-tenant, had ceased on the transfer of the *Sudder Putneedar*'s right. The plaintiffs were accordingly ejected in Magh 1223, B. S. The plaint proceeded to state, that as the plaintiffs had never failed in discharging the rents, and as the defendant had acknowledged the receipts of the rents for 1222, B. S. and such part of them for 1223, F. S. as they (the plaintiffs) had deposited in the Court, in consequence of the defendant refusing to take the rents, and as their rights were in no way affected by the alienation of the *Sudder Putneedar*'s title, the plaintiffs now sued and hoped for redress.

The defendant, in answer, declared the plaintiffs claim to be unfounded, and stated that the Zumeendar, Maharanee Kumulkoonwaree, in consequence of the default of Ramdeb Singh the *Sudder Putneedar*, publicly sold the above estate to him in conformity with the provisions of clause 3, section 15, of regulation 7, of 1799, with the permission of the Zillah Judge; that the regulations distinctly provided that, in sales of assessed lands, the engagements of the former incumbent cease after the public sale has taken place in satisfaction of arrears of rent; that the principle therefore on which the Zillah Judge acted, namely, that the right of the *Dur Putneedar* had ceased on the transfer of the right of the *Sudder*

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Putneedar or tenant *in capite*, is recognized and established by all the regulations, and particularly by regulation 8, of 1819. The defendant concluded by stating that the plaintiff, after he had purchased and obtained possession, improperly collected many sums of money from the ryots on the estate in dispute, of which he had recovered such parts as had been deposited in the Court, and was on the point of prosecuting them for the balance when they others instituted the present suit.

Mohun
Geer Moh-
hutuk v. Rad-
hamohun
Ghutuk, and
others.

On the 23rd of July 1823, the First Judge of the Provincial Court expressed his opinion, that it was clear from a copy of the defendant's petition and the vouchers given for the money deposited in the Court, that the defendant petitioned the Zillah Court, and on giving receipts obtained the money deposited by the plaintiff as the rents of the land in dispute, and that the fact was likewise acknowledged by the defendant in his reply; that his plea, however, founded on regulation 8, of 1819, was not sufficient, inasmuch as that regulation was enacted two years subsequent to the transaction which gave rise to the present suit. He therefore passed a decree in favour of the plaintiffs, awarding them possession of all the seventeen mouzas standing in the name of Jugmohun Ghutuk and in the fictitious name of Ramnarain Mullick, and Rs. 2989. 1. 14, mesne profits for the years 1224 and 1225, B. S. payable by the defendant, who was likewise declared liable for all the costs of suit.

Mohun Geer Mohant appealed to the Sudder Dewanny Adawlut from the above decision, and Radhamohun Ghutuk and Kishenmohun Ghutuk appeared to answer the appeal. At this stage of the proceedings Kishenmohun Ghutuk died, and Radhamohun was by an order of the Court, dated June the 22d, 1825, allowed to plead as guardian on behalf of Chundermohun, the minor son of the late Kishenmohun.

The cause came to a hearing on the 5th, 11th, and 25th of September, before the Chief and Fourth Judges (Messrs. Leycester and Dorin,) when all the papers and pleadings of the parties having been read, they recorded their judgment in the following terms:

The point to be determined in this case appears to be, whether the rights of the original *Putneedar*, viz. the person from whom the plaintiffs derived their tenure of the *durputnee* talook in dispute, consisting of seventeen villages, were sold or not, according to the usage prevalent at that time, in satisfaction of arrears due to the Zumeendar for the revenue of Kishenpoor and the other sixteen mouzas of the *putnee* talook. The admissions of the plaintiffs themselves are sufficient to establish the fact of a default on the part of the original *Putneedar*, Ramdeb Singh for the year 1220 F. S. and as the Maharanee, Kumalkoonwaries, having previously obtained the sanction of the Court to a second settlement by a summary suit instituted under regulation 7, 1799, on the ground of arrears, in the aforesaid year, transferred the *putnee* talook held by Ramdeb Singh to Mohun Geer Mohant, on the 5th of Asvin 1222 B. S. The Court conceive that there can be no doubt as to all the rights of the original *Putneedar*, as well as to the fact of those of the *Dur Putneedars*, who held of him, having ceased; and the power of making a new *dur putnee* arrangement resting solely with

1826. the actual *Sudder Putneedar*. Assuming it then as a proved fact that the original *Sudder Putneedar* was a defaulter in the year 1220 B. S. it does not appear, nor is it averred by the plaintiffs, who are the present respondents, that there was any fraud, bad faith, or deviation from existing customs in the mode of transferring the *putnee* talook to its new tenant. The substance of the pleas urged by the respondents is, first, that no blame attached to the *Dur Putneedars*, and the forfeiture of the rights of the *Sudder Putneedar*, or *tengant in capite*, did not affect them, and secondly, that as the appellant, the new *Sudder Putneedar*, had received the rents for the years 1222 and 1223, B. S. which were deposited by the respondents in the Zillah Court, and the Maharane had, on the default of the *Putneedar*, issued a notification to the *Dur Putneedars* who held of him, directing them to pay the revenue into the Zumeendaree Cutcherry till the decision of the summary suit, instituted under regulation 7, of 1799, they had, by these acts, virtually recognized the existence and continuance of the former *Dur Putneedars* right. The Court however, being of opinion that these pleas are insufficient to establish the respondents title to a continuance of their *dur putnee* engagement, and considering that the rights of the *Dur Putneedars* ceased on the transfer of the *sudder putnee* tenure in the year 1222 B. S. passed a decree in favour of the appellant, reversing the judgment of the Calcutta Provincial Court, and making all costs payable by the respondents.

1826.**GOPAL LAL, Appellant,***versus.*

Sept. 25th. RAJA TORULNARAIN SINGH, (son and heir of MAHARAJAH PITUMBER SINGH, deceased,) Respondent.

Claim to the possession of certain villages under an *akhrarnama*, or written acknowledgment from the conditional purchaser, alleged to have been executed nine years after the sale had become absolute : claim rejected,

MAHARAJAH Pitumber Singh was the original plaintiff, and the appellants Birj Lal, Nund Lal, and Rung Lal, the original defendants in this case. The suit was instituted in the Patna Provincial Court, on the 7th of July 1821, to recover possession of Mulawan Mowjoodpoor (exclusive of the jaghire of Maharajah Kullian Singh), and certain other villages situate in perganna Tillaia, sillaip, Behar, to have the plaintiff's name registered as proprietor in the Collector's office, and to enforce the receipt of the revenue from him. The suit was laid at Rs. 9900; three times the amount of *jumma*.

The plaint set forth, that the plaintiff, in 1203 F. S., mortgaged the above villages as well as Amjhowsie and other mouzas (altogether, fifteen and three quarters in number) to the defendants Gopal Lal and Nund Lal, sons of Bechoo Lal, for Rs. 6,001, redeemable within five years, and at different times, within the period prescribed, had offered to repay the monies advanced on the mortgage, but they refused to accept it, making excuses and

delays; that when, in consequence of this he (the plaintiff) was about to sue them, the purchasers consented to relinquish possession of the villages now claimed, and on the 4th of Moharrum 1225 Hijra, (corresponding with the 27th of March 1810 F. S.) executed an *ikrarnama* to that effect; but, subsequently, in violation of their agreement, first sued Meer Moohummud Bakir Khan, mokurrereedar of the above parganna, in the Behar Zillah Court to recover the *malkana* or proprietary dues payable from all the above mouzas: and after his death, when the above parganna reverted to Government, and a notification had been issued in 1224 F. S. for the formation of a second settlement by Mr. Middleton, they made proposals, and a settlement was concluded with them for the villages specified in the *ikrarnama* at an increased jumma in the name of Gopal Lal, and for the remaining mortgaged villages at a diminished jumma in the name of Nund Lal, and that when the plaintiff preferred a petition to the superintendent (Mr. Middleton) and the Board of Commissioners, he was referred to a regular suit; that he accordingly sued the above named individuals, and Rung Lal and Birj Lal, their brothers, in the Provincial Court, for restitution of all the mortgaged villages, and obtained a decree from that Court; but this judgment was reversed on appeal by the Sudder Dewanny Adawlut, on the 28th of November 1820, which Court directed him to sue *de novo* for possession of the villages specified in the *ikrarnama*. In conformity with that order he had instituted the present suit.

The defendant Nund Lal, in reply, denied that he had executed the *ikrarnama* alluded to by the plaintiff, that he had ever confessed the execution of it before any person, or that he had ever seen it. He alleged that the plaintiff must have forged it to suit his own purposes, otherwise, had it been authentic, he would either have immediately obtained or sued for possession of the lands specified therein, and would never have allowed eight years to elapse before he brought his suit; and twelve years before he brought the present suit without asserting his rights; that the villages in dispute were in fact a part of his late father's estate, and that he and the three other defendants were in possession of equal shares of it, as heirs at law. Gopal Lal stated in reply, that his father was seized of the villages in dispute under a deed of mortgage and conditional sale, executed six and twenty years ago by the plaintiff, who had failed to redeem them within the prescribed period; that he and his three brothers Nund Lal, Birj Lal and Rung Lal, had succeeded on his death to equal shares; that the plaintiff's suit relative to it had been dismissed by the Court of Sudder Dewanny Adawlut, and that the *ikrarnama* produced by the plaintiff was not a genuine instrument.

The Second Judge of the Provincial Court, in passing judgment, on the 16th of April 1823, observed that the authenticity of the *ikrarnama* purporting to have been executed by Gopal and Nund Lal, had been established by the evidence of Ram Anograh Singh and Ranjeet Singh, the witnesses whose names appeared on the margin of the deed; that he considered the declaration contained in the decree of the Sudder Dewanny Adawlut, viz. that "the *ikrarnama* could in no way assist the respondents (plaintiffs) claim,"

the agreement being not proved or, though proved, being either without a consideration or the condition violated by the claimant.

1826. merely to mean that, in that particular case it was insufficient to disprove the fact of *an absolute sale*, inasmuch as the respondent Gopal Lal, was, at the end of that decree, left at liberty to sue *de novo* for the villages specified in the *ikrarnama*. He therefore passed a decree in favour of the plaintiff, awarding him possession of the villages specified in the *ikrarnama*, and directing his name to be registered as proprietor in the Collector's office and the revenue to be received from him. All costs of Court to be borne by the defendants.

Gopal Lal, appealed to the Sudder Dewanny Adawlut, for his fourth of the villages claimed, laying his appeal at Rs. 2475, three times the amount of the *jumma*. Maharajah Pitumber Singh was, on his death, succeeded in the case by his son, the present respondent.

The case came to a hearing before the Chief and Fourth Judges, (W. Leycester and W. Dorin,) on the 18th, 19th, and 25th of September 1826, who passed a decree to the following effect :

"Without adverting to the permission granted by the decree of the Sudder Dewanny Adawlut, dated the 28th of November 1820, in the case of this same Gopal Lal and others, appellants, *versus* Maharajah Pitumber Singh, to sue *de novo* on the *ikrarnama* dated the 11th of *Mohurru* 1225, *Hijree*, corresponding with the 27th of *Magh* 1217, F. S. (which whether really granted or not does not materially affect the case either way) the Court are of opinion, that the actual execution of the alleged *ikrarnama* has not been fully and satisfactorily established by the evidence of the witnesses adduced to testify the fact, and that the appellant Gopal Lal never acknowledged the execution of it. The other three defendants positively deny it; even supposing Gopal Lal to have expressly avowed its execution, a document of this nature is perfectly invalid as respects the rights of the other three persons; allowing, moreover, the authenticity of the deed to have been fully established against them all, it is an instrument giving property to a stranger apparently for no consideration. Now it was either such, or (what is more probable) it was to prevent a law suit on the *bye-bil-wuffa* transaction of 1203; indeed the respondent in his answer to the reasons of appeal admits this to have been the ground of the agreement. But he evidently broke through this agreement, having sued to redeem, in which suit he failed. On the other hand, supposing no consideration, the agreement must be looked upon as fraudulently obtained. Besides the *bye-bil-wuffa* became absolute in 1208, F. S. and the agreement was executed in 1217, if at all, and no possession obtained under it. This suit to enforce the agreement is brought eleven years after its date, and nineteen years after the conditional sale became absolute. The present plea resting on the alleged agreement is at variance with the former one, which was founded on the right of redemption. These two pleas by reason of their oppugnancy cannot both be admitted."

The appeal was accordingly decreed, and the judgment of the Provincial Court reversed, all the costs of both Courts being made payable by the respondent.

MURDUN SINGH and LOCHUN SINGH, Appellants,
 versus
 KHYRAT ALI, (son of NUJEEB ALI KHAN,) and others,
 Respondents.

Decr. -
 1886. -
 Sept. 21.

THIS suit was instituted by the appellants against Nujeeb Ali Khan, father of Khyrat Ali, and the other respondents in the Cawnpore Zillah Court, on the 27th of March 1847, to recover possession of Mouza Bilsarayan, consisting of 4186 beegas of land in perganna Akburpoor Shapoor. The suit was laid at Rs. 1800, the amount of the annual jumma and profits.

The plaint set forth, that the above estate was the hereditary zameendaree of the plaintiff's grandfather Khurug Singh, who had three sons, Gopal Singh, Dhun Singh and Pirthee Singh. Gopal Singh was the father of the plaintiff Murdun Singh, and died subsequently to the plaintiff's birth, during the life time of Khurug Singh; that Khurug Singh while alive, put Dhun Singh his second son in possession of the estate in question, and had his name inserted as proprietor in the Canoongee's books; that the well, garden and tanks, which distinguished the estate enjoyed by Khurug Singh and his ancestors were still to be seen; that in the time of Zeynoolabideen Khan, the ameer of the above perganna, two and thirty years ago, Nirput Singh, a person residing in the perganna, from motives of hostility, broke into the house, murdered Dhun Singh and Pirthee Singh with their wives and children, and carried away all the property of the family; that the plaintiff (who was nine years old at the time) fled to mouza Mundolee in the above named perganna, and took up his abode in the house of his maternal grandfather, and, although he instituted a suit in the time of the Nuwab Wuzeer, failed to obtain redress; that then or twelve years after the death of Dhun Sing, when the plaintiff had arrived at years of maturity, and subsequently to the accession of the Honorable Company, he was present at the formation of the settlement in 1210 F. S. before Tajooddeen Hosein Khan, the ameer appointed to carry that measure into effect, and petitioned that the settlement of the estate might be made with him as proprietor, but his application was unattended to, and a moostajrees settlement was concluded; that in 1216 F. S. Tajooddeen Khan prevailed on the defendants, Nujeeb Ali Khan, Khoda Buksh Khan, and Badil Khan, to execute a bill of sale in consideration of Rs. 700, in his own favour, under the fictitious name of Moohummud Roostum, for the above mousa, as well as for Mobarukpoor Lata, Sindapoore Turownde, and three other mouzas; that a settlement was concluded for these mouzas in the year 1216, in the name of Moohummud Roostum; that towards the end of 1219 F. S. Tajooddeen Khan executed a bill of sale under his fictitious name of Moohummud Roostum, for the above mouzas, as well as mouza Mobarukpoor Lata, &c. in favour of Meer Rumzaan Ali, for Rs. 3000, without any specification of the place of residence or family of that individual; that at the settlement for 1220, to 1224, F. S. inclusive, Mr. Newnham (the acting Collector) having discovered that Tajoodseen had fraudulently obtained possession

1826. of the mouza in dispute through the collusion of Nujeeb Ali, whereas in fact Nujeeb Ali and the rest had no right to it, and that Murdus Roostum and Meer Rumzan Ali were not present, ordered a *moostajuree* settlement to be concluded with Mohun Lal Sookul, till Lochun Singh and Khyrat Ali the Board of Commissioners, and a settlement subsequently made and others. in the name of Meer Rumzan Ali, the second purchaser; and the plaintiffs were referred to a civil suit. They accordingly brought the present action.

The defendant Nujeeb Ali Khan, stated in reply, that he held the estate in dispute under a royal *firman* and grants from former rulers; that the plaintiffs or their ancestors were never in possession; that many persons make gardens and wells in the lands of others for the use and refreshment of travellers, and that if the plaintiffs had done so in former times, it was insufficient to prove proprietary right to the lands.

Meer Rumzan Ali in reply, alleged the mouza to be the ancestral estate of Nujeeb Ali Khan, who sold it at the end of 1215, or beginning of 1216, F. S. to Moohummud Roostum, together with mouzas Mebarukpoor Lata, Lodeepoor, Ahmudpoor, &c. and he (the said purchaser) accordingly obtained and enjoyed possession from 1216 to 1219, F. S. inclusive; that at the end of 1219, F. S. he (the defendant) purchased it for Rs. 3,000 from Moohummud Roostum, through his master Ali Hoosein Khan, and obtained possession; and that at the formation of the quinquennial settlement from 1220 to 1224, F. S. inclusive, Mr. Newnham the acting Collector, unjustly dispossessed him (the defendant) and, notwithstanding he made enquiries whether any persons had claims to the above estate, no one was found to have any title thereto except himself (defendant). He however let it in farm to Mohun Lal Sookul. He (the defendant) attended before the Board of Commissioners to establish his right, and that Board being persuaded of the justice of his claim, annulled the *moostajuree* settlement, and ordered that a settlement should be concluded in his (the defendant's) name in proprietary right. He accordingly obtained possession of the mouza, and the plaintiffs had instituted the present suit at the instigation of evil disposed persons with the view to injure him. Had they in reality been in any way entitled to the property, they would have appeared at the formation of the first settlement (which was publicly proclaimed in order that the zameendars might attend) and have made application. The ancestors of Murdun Singh had left the village for 17 or 18 years, and the plaintiffs had even acknowledged in their plaint that they had left the place thirty-two years ago. With respect to Lochun Singh, the second plaintiff, it did not appear on what ground he was a party in the cause, as the plaint specified nothing on that point, otherwise he would have replied to him. The defendant Tajjoodeen Hoosein Khan, in reply, declared that he had nothing to say to the purchase of the village in dispute.

The defendants Khoda Buksh Khan, Badil Khan, and Moohummud Roostum, did not appear to plead, although notice had been duly served on them.

On the 4th of March 1820, the Zillah Judge being of opinion that the title of the plaintiffs had been fully established by the evidence adduced by them, that the depositions of the defendants witnesses were unworthy of credit, and that the fact of Mookum-mud Roostum being a *fuzee* name for Tajodeen was abundantly proved, and for other reasons specified in his decree, passed judgment in favour of the plaintiffs, awarding them possession of the estate in dispute, and making all costs payable by the defendant Meer Rumzan Ali.

Murduan
Singh and
Lochun
Singh, etc.
Khyrat Ali
and others.

Meer Rumzan Ali appealed to the Bareilly Provincial Court. He rested his appeal as well on the absence of right of the adverse party, as on the limiting regulation of 2, 1805, which he contended legally precluded all cognizance of the case. Murduan Singh and Lochun Singh, although they had acknowledged the receipt of a notice did not attend.

On the 2nd of January 1821, the First and Fourth Judges of that Court recorded their judgment as follows :

"The plaintiffs were unable to produce any document in the Zillah Court to prove their title to mouza Bilsurayan, the estate in dispute, and, in the opinion of the Court, the mere evidence of the six witnesses called by them, is insufficient to establish their right. No claim moreover was preferred by the plaintiffs to the above mouza at the formation of any of the settlements previous to the present suit. On reference, moreover, to four decrees passed by this Court on the 2nd and 4th of October 1817, and 29th of June 1826, (by which the decrees of the Acting Judge of Zillah Cawnpore were reversed) relative to mouzas Sundapoor Turownda, Lodeepoor, Ahmudpoor, Seonda and Mobarukpoor Lata, in cases where all the present defendants were included as defendants, and in which the present Rumzan Ali was either appellant alone or in conjunction with Tajodeen Hoosain Khan, viz. No. 937, in which Ajub Singh (plaintiff) was respondent; No. 945, in which Ghases Ram, and others (plaintiffs) were respondents; No. 946, in which Bulloo and others (plaintiffs) were respondents; and No. 1303, in which Ajub Singh and others (plaintiffs) were respondents; the Court are of opinion that with the exception of the names of the plaintiffs and the name of the village claimed, the above four cases are exactly similar and correspond with the present ones. They therefore reverse the judgment of the Cawnpore Zillah Court and make all costs payable by the respondents."

The present appellants, being dissatisfied with the foregoing award, presented a petition for a special appeal to the Court of Sudder Dewanny Adawlut, laying their claim at Rs. 1585, the amount of annual assessment.

The Second Judge (C. Smith) being of opinion that there had been no possession on the part of the appellants since the year 1810, F. S. thought that their petition for a special appeal should be rejected, but this was ultimately allowed by the Third and Fifth Judges (J. Shakespear and W. B. Martin,) who were of opinion that the case required a more careful investigation. None of the respondents appearing to plead except Meer Rumzan Ali, the case came to a hearing before the Chief and Fourth Judges (W. Leyester and W. Dorin,) on the 12th and 25th of September 1826, when all the pleadings of the parties and papers connected with the case

1826. having been read, they recorded their judgment to the following effect :

Murdun Singh and Lochun Singh, v. Khyrat Ali and others. "There having been no possession on the part of the appellants or their ancestors, since the date of the Company's acquisition of these provinces (about sixteen years), and none for twenty-two years before (namely since the year 1887), and no application being proved to have been made at either of the three first settlements on the part of the appellants, the claim is not cognizable under the provisions of regulation 2, 1805." They accordingly affirmed the decree of the Bareilly Provincial Court, overruling the order of the Cawnpore Zillah Court, and dismissed the appeal with costs.

1826.

GOURCHUNDER RAI and others, Appellants,
versus

Dec. 28th. HURRISH CHUNDER RAI and others, (heirs of JUGGUT CHUNDER RAI,) Respondents.

Held that the rule against taking cognizance of claims to land purchased in a fictitious name applies not only to the parties who engaged in the illegal transaction but also to their heirs and others, where the illegal transaction forms the foundation of the claim.

THIS suit was instituted in the Zillah Court of Dacca Jelalpore, on the 16th of April 1814, by Nubkishen Rai, (father of Gourchunder Rai and the other appellants) against Govindpershad Rai, and Raj Narain Rai, to recover a half share of pergunna Gungaput, the yearly produce of which was estimated at 1510 rupees.

It was set forth in the plaint; that two brothers Odey Narain Rai and Roop Narain Rai, the father and uncle of the plaintiffs, lived together as an united family on the income arising from their paternal property, and from certain other property acquired by themselves; and that in the year 1207, they purchased by private sale the Turruf of Bhatoe Doba, the pergunna of Gungaput and Golajynuggur under the name of Muddoosoodun (another name for the defendant Rajnarain) from Kishen Mohun the former talookdar. In the year 1208, some part of the property above mentioned, viz. the pergunna of Gungaput was sold by auction for arrears of revenue and was purchased by the plaintiff Nubkishen Rai, under the name of Ramanund Bose, for Rs. 5,000, the purchase being effected by a Gomashtha of the parties by name Birj Mohun Bose, and the money being raised upon the sale of Golajynugger, to Moulojee Ali Nukee, and by loan afforded by him to the said Nubkishen (the plaintiff). At the same time a deed of sale and bond was executed by the said Nubkishen (the plaintiff) under the name of Muddoosoodun to Rajnarain Rai, one of the defendants who was the Gomashtha of both parties. After the death of both the brothers which occurred in 1814, and 1816, the plaintiff (son of one brother) continued living with the defendant Govindpershad (son of the other brother). The latter, however, in 1219, B. S. having, by intrigue, procured from the defendant Rajnarain, a bill of sale for Gungaput in his (Govind's) name, presented to the Collector's office a petition for the entry of his name as sole proprietor thereof. A counter petition was filed by the plaintiff, and

the Collector directed the parties to try the case at law. Hence _____ the present action.

For the defendant Govindpershad Rai, it was stated in reply, that no partnership ever existed between Odey Narain Rai and Roop Narain Rai, as regarded the land in dispute, for that the latter purchased with his own money the estate, and exercising all the rights and privileges of a sole proprietor, was so to all intents and purposes up to the time of his death, when the estate hereditarily descended to Govindpershad, his son and heir, whose it then was ; and that he could produce the bill of sale to shew that the estate never was purchased jointly ; but by one person.

The defendant Raj.Narain Rai, replied on his part that Gungaput, Bhatoee Doba, and Golajnuggur, were purchased by him for the use and with the money of the defendant Govindpershad, under his alias of Muddoosoodun, from the former talookdar Kishen Mohun. The plaintiffs had no concern whatever with it. The statement of the plaintiffs with regard to the auction purchase was altogether untrue, for the purchaser was Govind Chunder Rai, through the defendant Rajnarain, and under the name of Ramanund Bose; the money for the purchase being raised by the sale of Golajnuggur to Mouloves Ali Nukes, effected by him, the defendant Rajnarain Rai.

The parties produced a great variety of documentary evidence and a number of witnesses to support their respective allegations as to the state of the family at the time the purchase of Bhatoee Doba was made, and the source from whence the purchase money was defrayed. The Judge of the Zillah decided on the 4th of December 1818, in favour of the defendants. He did not consider that the fact of partnership having existed was made out by the documents filed for that purpose by the plaintiff ; while the statements of the defendants were borne out by the bill of sale signed by Kishen Mohun, the acknowledgment signed by Muddoosoodun and the other papers and documents filed by them in the case. On appeal to the Provincial Court of Dacca, this decision was affirmed by the First Judge of that Court, who considered that Govindpershad had bought with his own money, in the name of Muddoosoodun alias Rajnarain Rai, the land in dispute. He therefore dismissed the appeal with costs.

The appellants filed a petition for a special appeal in the Court of Sudder Dewanny Adawlut, which was granted on the ground that the sole proprietorship of the land in question by Govindpershad, though recognized by the Courts below, was not made out satisfactorily by the evidence in the case ; and that there appeared to be some doubt whether Rajuarain and Muddoosoodun were one and the same person.

The Second Judge (C. Smith), went into the merits of the case on the 18th and 20th of March 1826, and recorded, as the result of his investigation, the opinion that a partnership had subsisted between the parties with regard to the land in dispute ; that is, that the land was purchased jointly by the two brothers, under the name of Muddoosoodun, as stated by the appellants, that after the death of both brothers, Govindpershad Rai had, jointly with the plaintiff, entered into possession of the land, from which he subse-

Gourchunder Rai and others, v. Hurrischunder Rai and others.

1826. *Gourchunder Rai and others, v. Hurnishchunder Rai and others.* quently by violence ousted him. That it was of no consequence whether Muddoosoodun was or was not the same person as Rajnarain, inasmuch as it had been proved that the purchase money of the land in dispute had been defrayed from the joint property of the two brothers. He therefore recorded his opinion that the decrees of the lower Court should be reversed.

The case next came to a hearing before the Chief and Fourth Judges of the Sudder Dewanny Adawlut (W. Leycester and W. Dorin,) on the 12th of June and 1st of August 1826. They differed in opinion from the Second Judge, and on the latter date recorded their judgment to the following effect: "According to the statement of both parties, the pergunna of Gungaput, previously the property of one or both of them, was sold at auction for arrears of revenue in the year 1208, B. S. and, as the plaintiff alleges, was repurchased half by him, or as alleged by the adverse party, repurchased solely by them; but, according to both, repurchased in a *furseer* or fictitious name, and in breach of the provisions laid down in regulation 7, 1799. According to the various precedents mentioned in the note (a), the plaintiff as a contravener of the above law cannot be aided in the recovery of his half share, and it makes no difference that his opponent is in the same predicament. It is not in favour of the defendant that the Court refuse aid to the plaintiff, but because it is improper to aid the plaintiff in benefiting by his contravention of the law. Had this case been without a *benamiee* recovery, it would have stood exactly as the other (b) between the same parties and a moiety have been decreed to each." The Chief and Fourth Judges, on the above grounds, declared their opinion that the claim should be dismissed with costs, but, at the same time, deeming it a case of importance as a precedent, and one that was not altogether free from doubt and difficulty, they directed that it should be laid before another Judge. It was accordingly brought before the Fifth Judge (A. Rose) who, in delivering his judgment expressed himself to the following effect: "The First and Fourth Judges have cited precedents which obtained in this Court and by which their opinions have been guided, but which do not appear to be in point or applicable to the case under consideration. The rule hitherto appears to have been to refuse to take cognizance of a claim in which the original purchaser has sued the person employed by him to make a fictitious purchase to obtain possession of the property so fictitiously purchased. But this is not the case in the present claim. There is indeed a wide difference, for neither did the claimants themselves in this case make a purchase in a manner prohibited by the regulations, nor is there any fictitious purchaser standing up to deny their claim. The plaintiff on the death of Odey Narain, was entitled to half the property in dispute by the law of inheritance, and his claim was

(a) Case No. 75, Rammanik Inder, *v.* Jynarain, see vol. 1, page 289.

Case 869, Maharaja Bishenath Roy, *v.* Moonahée Kurreemoolia Chowdhry and others, see vol. 2, page 71.

Case 1937, Jharkundee Lal, *v.* Baboo Chullmon Singh.

Case 1572, Dilaram and others, *v.* Roopchund Sahoo, see vol. 3, page 24.

Case 1676, Kaleepernhad Surma, *v.* Pudum Lechun Surma.

(b) Reported as a decision of the 29th of June, of the present year, page 162.

against his coheir under that law, and not against any fictitious purchaser. On these grounds, and not seeing that any precedent exists to the contrary, I concur with the Second Judge in opinion that judgment should be passed in favour of the claim." In consequence of the above difference of opinion it became necessary to refer the case for final decision to a fifth Judge. On the 27th of December 1826, the case was taken up by the Third Judge (C. T. Sealy,) who observed that the plaintiff had sued for possession of half pergunna Gungaput under the plea that the whole pergunna which formerly belonged to his father and uncle, had been sold by public auction for arrears of revenue in the year 1208, and purchased by them in the fictitious name of Ramanund Bose, that by clause 4, section 29, regulation 7, 1799, all defaulters are positively restricted from becoming the purchasers, directly or indirectly, of their own lands disposed of by public auction on account of arrears, and that that which has been prohibited by the regulations cannot be recognized in practice. He therefore concurred with the Chief and Fourth Judges in dismissing the claim with costs.

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CASES IN THE SODDER DEWANNT ADAWUT.

1822

RAM NARAIN RAI, Appellant
versus
REAZ OODEEN, FYAZ OODEEN and MOOHUMMUD KA-
SIM, Respondents.

Jan. 1822.

THIS suit was brought by Ram Narain Rai against Reaz Oodeen and others, on the 25th of May 1822, in the Provincial Court of Dacca, to establish his right to assess, at an enhanced rate, Damachun and other mouzas, belonging to the perganna of Neelhutta Amerabad. The claim was laid at Rs. 12,642. It was stated in the plaint, that the plaintiff Ram Narain purchased this zemindaree at public auction, and that the defendants, his tenants, having connived with his Naib or deputy Goorochund Bose, caused him to execute documents in their favor, such as bills of sale, leases, and other instruments of this kind, and, upon the strength of them, brought an action against the plaintiff for possession of the above mentioned mouzas—and filed two Pottahs signed by his Naib in support of their claim. The Zillah Judge, notwithstanding the Naib was not authorized without the permission of the plaintiff to grant leases to the defendants, relying on the two Pottahs, passed a decree adjudging possession of the lands in dispute to the defendants for ten years, subject to the rents specified in the Pottahs and permitting the plaintiff, after ten years, to sue the defendants for an encrease of jumma. This decree was affirmed in the Provincial Court of Appeal. The mouzas by measurement contained about 8,334 beegahs of cultivated land, and according to the rates of the perganna, the jumma should be paid at the amount now sued for. From the beginning of the year 1206 B. S. up to the present time the defendants have not paid a rupee and the ten years having now elapsed, this action has been brought in conformity to the permission given, as above alluded to. The defendants in reply denied the allegation that Goorochund Bose, was originally the Naib of the plaintiff and stated, that Goorochund Bose himself, in the year 1207, purchased the perganna of Neelhutta Amerabad, at a public sale, held by the Collector, and took some other persons as his partners. The plaintiff, eleven years afterwards, purchased this perganna from the said Goorochund Bose, and for the purpose of destroying the right of the partners took from the said Bose the bill of sale of the former date, and entered his own name in the Collector's office. The Board of Revenue discovering this fraud were prepared to rectify it, but, in the interim, the plaintiff having colluded with Goorochund Bose made himself master, and appointed Gborochund for arrears. Bose his deputy and so became possessed of the whole of the perganna. Under what grounds then could the plaintiff, after stating himself that Goorochund Bose was unauthorized to grant a Pottah, obtain from him a bill of sale for the whole zemindaree. The defendants also further stated, that the land in question was their tenure by inheritance and that the rest of it was fixed in perpetuity at 2098. 6. They alleged also that in the year 1201, Kaloo Bhunkur Rai, father of the plaintiff, dispossessed their ancestors, Pottahs granted by the ostensible auction purchaser of lands and conditioning that at the end of ten years should continue on the same terms (it being them by the 44th regulation, 1793, not legal to grant a longer lease than ten years) held to be binding against the real purchaser and good against his claim to enhanced assessment at the end of the term, without, however, affecting the rights of Government or any future purchaser of the whole perganna, in case of a public sale for arrears.

1827. and on their bringing an action against him for the right of possession at a fixed *jumma*, they obtained a decree; Goorochund Bose after purchasing the said pergunna also dispossessed them and when the defendants were about to bring an action against him, the father of the plaintiff was chosen an arbitrator, and he decided that the sum of 704 Rs. should be added to the *jumma*, and that this sum (altogether 2,803. 4. 8.) should be fixed in perpetuity; but as, according to the regulations of 1793, no Pottah could be granted for more than ten years, this term was specified, and it was stipulated that, at the expiration of it, a new Pottah should be granted on the same terms and that no more should at any time be demanded—afterwards in the year 1207 B. S. the plaintiff again dispossessed the defendants, upon which they instituted an action against him in the Zillah Court of Dacca Jelalpoor, and upon proof of the Pottah, and the conditions specified therein, obtained a decree, which was affirmed by the Court of Appeal and a petition for a Special Appeal presented by the plaintiff to the Court of Sudder Dewanny Adawlut was rejected by that Court. But since the regulation restricting the grant of long leases has been repealed by a subsequent enactment how can the plaintiff who stands in the place of Goorochund Bose infringe the conditions of an agreement executed by the said Boose and demand more rent; and with regard to the plaintiff's statement, that the *jumma* at present, is less than that specified in the account sale, the defendants contended, that it was totally false—for that in the year 1206, Kalee Shunker Rai, father of the plaintiff sued them on the same account, but his suit was dismissed. The plaintiff in his replication stated, that it appeared, according to the plaintiff's admission, that there had been added to the former *jumma* the sum of 704 Rs. and that a Pottah at a *jumma* of 2,803 Rs. had then been granted. But such having been admitted to have been the case, it was idle to contend that the tenure was of a *mokarrree* nature—nor was it agreeable to the regulations, that a purchaser at an auction sale should be denied the privilege of measurement and re-assessment where such appeared necessary with a view to the equalization of burthens or other lawful purposes.

The Third Judge of the Provincial Court recorded his opinion to the following effect. "There are two points in this case to be considered, 1st, whether Goorochund Bose, who was the purchaser of the pergunna of Neethutta Ameerabad, and the *furzee* proprietor, of the same, was authorized to grant the two Pottahs to the defendants on the 26th of Bysack 1209 B. S. 2dly, whether, the plaintiff, notwithstanding the conditions, as stated in the Pottahs, has the privilege to assess the *jumma* of the land in dispute *de novo*.—With regard to the first point, it is manifest, that if at any time an individual, in a fictitious manner, purchases at auction any lands in the name of another, being his relation, connection, or any other person, and uses the name of such person, as ostensible proprietor of the same, and through him transacts the business of the zamindaree, such practice being contrary to law, should any loss arise, it is at his own risk. And although the plaintiff may have been in truth original proprietor, still from the 26th of the month of Bysack 1209, up to the time of the defendants being disposses-

sed, altogether seven years and four months, he made no objection to the Pottah, and the jumma as therein stated from which there can be no doubt, that the terms were fixed with the plaintiff's knowledge. This circumstance is greatly in favor of the defendants. With regard to the second point it is clear, that the claim of the plaintiff to enhance the jumma of the lands in dispute is illegal—for this pergunna was not sold on account of arrears of revenue due to Government, but for the satisfaction of a decree of Court. Besides in the Pottah it is written "that the defendant shall pay jumma fixed at 2,803 Rs. per annum; and as according to the regulations no Pottah can be granted for more than ten years, when that time shall have expired, the lands shall be continued to the lessees on the same terms," whence it is evident that this same jumma is to be continued in perpetuity and that the mahal in question is not liable to increase of assessment. The Pottah is conformable to the existing regulations, and looking at clause 3, section 7, regulation 1, 1793, which requires on the part of the zemindars good faith and moderation towards their dependant talookdars and ryots, it would seem that if at present the profits of the mahal in question should be twice, nay ten times as much as they were before, any infringement of the conditions of the Pottah is unjust and illegal—consequently the plaintiff's suit should be dismissed with costs—but with this understanding between the parties—that (as the circumstance and evidence in this case and indeed the tenor of the Pottah indicates) the mahal in question is to be considered in the light of a *Pottah-daree* tenure attached to the zemindaree, and the jumma of it is not to be considered of so permanent a character as that, in the event of the whole pergunna being sold for arrears of Government revenue and coming into the hands of an auction purchaser, or of its being held *Khas* by Government, the rules contained in the 5th section of regulation 44, 1793 would not be applicable to it, for in such case the provisions contained in the fifth section of the above enactment for cancelling former engagements would hold good.

The plaintiff being dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut. This Court, (present W. Leycester and W. Dorin, chief and fourth, Judges), were of opinion, that there was no sufficient ground for interfering with the decree of the Provincial Court, because, whoever the grantor of the Pottahs (Goorochund) may have been, they bind the plaintiff under the circumstances, and because it might be inferred from the contents of the Pottahs, that the parties contemplated a fixed jumma not liable to increase so long as the zemindaree should endure. The decree of the Provincial Court of Dacca was therefore affirmed and the appeal dismissed with costs.

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Jan. 11th.

KOUNLA KANT GHOSAL, and others, Appellants,

versus

RAM HUREE NUND GRAMEE, and others, Respondents.

According to the Hindoo law as current in Bengal the gift of joint and undivided property, to the extent of the donor's share is valid.

THIS suit was instituted by the respondents against the appellants in the Zillah Court of Hooghly, to recover possession of certain rent free lands, together with a portion of a tank. The case for the plaintiffs was thus stated. Shuhdeo Nund Gramee, an inhabitant of Mungrowl, took Shunker Ghosal, the father of the plaintiffs, while an infant, into his own house and performed for him all the initiatory ceremonies, educated him and treated him in every respect as his son. When he grew old and infirm the said Shuhdeo executed a deed of gift in the month of Kartik 1212 B. S. in the presence of the most respectable persons transcribing to him (Shunker) 17 beegahs 1 biswa of land *Bruhmotur* and *Devottur*, situated in Mungrowl and other places, and a fourth share of a tank, known by the name of Nund Gramee's tank, together with other property. The gift was accompanied by the condition that after the death of the donor, the donee should perform the funeral rites of the deceased. The father of the plaintiff accepted the gift and became possessed of the effects of the deceased; and after his death burnt his corpse and performed the funeral obsequies, &c. In the year 1217 B. S. the father of the plaintiffs died. At his death the plaintiffs came into possession of the property and kept up the worship of the Idol Runchundee Thakooranee which was a duty incumbent on the party in possession. They subsequently sold three beegahs of the land to Jankeeram Foujdar, and remained in possession of the remaining fourteen without interruption from any one. In the year 1225 B. S. the defendants dispossessed the plaintiffs unjustly of nine beegahs five biswas. On that account the plaintiffs sued them for possession in conformity to the provisions of regulation 49, 1793. On this an order was issued, that the plaintiffs should prove their title by a regular suit. In consequence of this order the defendants dispossessed the plaintiffs of the remaining land possessed by them (besides the three beegahs which they had sold) and the share of the tank, and also took possession of the idol and all the fees and profits deriveable from the worship of it. Under these circumstances the plaintiffs sued to be restored to the possession of the fourteen beegahs one biswa and to the exclusive privileges and emoluments deriveable from the service of the Idol, together with the share of the tank appertaining thereto, the whole being estimated at 1,439 Rs. Ram Huree Nund Gramee one of the defendants urged in his defence, that Gourhuree Nund Gramee was the great grandfather of the defendant, and the grandfather of Shuhdeo Nund Gramee, and that the said Gourhuree previously to his death made over the property in question, which he himself had acquired, to his two sons, jointly; one share to Seeta Ram the father of the said Shuhdeo and the other to Nitianund the grandfather of the defendants.

After that, the said Shuhdeo and the father of the defendants having separated, lived upon the proceeds of their respective properties. At last when the said Shuhdeo died without issue and unmarried, the defendants and Gourhree Nund Gramese and others became his legal heirs and under the circumstances of the case Shuhdeo had not the power to give his entire estate, to the father of the plaintiffs, during the existence of his lawful heirs, (the defendants) and in opposition to the Hindoo law. The father of the plaintiffs was neither connected with him by blood nor by any other tie; and the allegation therefore of his having received the property by way of gift was absurd. After the death of the said Shuhdeo the defendant (Ram Huree) performed his funeral obsequies, and the father of the plaintiffs had nothing to do with them. The plaintiffs state that their father received the gift in the year 1212 B. S., but till the year 1215 B. S. the said Shuhdeo was in existence and was possessed of those lands of which he continued proprietor till his dying day. Therefore, if it was true that the father of the plaintiffs received them in 1212 B. S. why was the donee in possession of the lands given. The foundation of the claim of the plaintiffs was that they, with others, were cultivators of the lands in question, and had omitted to pay the rent of them to the defendants. Wherefore the defendant (Ram Huree) took into his own hands the lands which were cultivated by the plaintiffs, and was about to sue them and the other cultivators for rent, when they collusively brought forward a complaint in conformity to regulation 49, 1773, and, that being dismissed, they were induced to bring this forward. Besides the Idol Ram Chundee Thakooranee and the land annexed thereto is not the inheritance of the defendants nor was it acquired by Shuhdeo. It is public property. The proprietor of the lands, whoever he may be, appoints a person as superintendent who is removable on proof of misconduct. The privileges and profits deriveable from the idol appertain to Gudadhur Bhuttacharuj, who was the Gooroo of Shuhdeo and of the defendants, and who, by reason of his living at a great distance, made over the same to the care of the defendants and the aforesaid Shuhdeo by whom the proceeds were remitted to him. The futility therefore, of the deed of gift exhibited by the plaintiffs was evident from these circumstances.

On the 5th of September 1822, the Judge of the Zillah Court gave judgment in the case, declaring his opinion that it was clearly proved from the books of the Collector's office, the deed of gift and other papers, and the evidence of several witnesses adduced by the plaintiffs, that Shuhdeo Nund Gramese did educate Ram Shunker Ghosal, the father of the plaintiffs, from his infancy; that they lived together, and that the said Shuhdeo did make over the whole of his property to Ram Shunker in the month of Kartick 1212 B. S. in the presence of Ram Mohun Ghose and other respectable witnesses mentioned in the deed of gift, and that the said Ram Shunker was possessed of the property during his life time, and that after his death the plaintiffs, till the year 1224 B. S. held it without interruption. He therefore decreed that the plaintiffs should be put into possession of the property claimed and that the costs should be charged to the

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defendants. The appellants, not being satisfied with this decree, appealed to the Calcutta Court of Appeal. The Fifth Judge of that Court, on consideration of all the papers of the case, recorded his opinion to the following effect. "The respondents claim to the property left by Shuhdeo is founded on the deed of gift dated the 28th Kartick 1212 B. S. executed by Shuhdeo Nund Gramee in favour of Shunker Ghosal their father; but there is no dependence to be placed upon the said deed, because, in the evidence brought by the respondents to prove it, before the Judge of the Zillah, there is much contradiction. Doorga Churn, one of the subscribing witnesses to the deed of gift, states that Ram Mohun Ghose was also one of the witnesses to it, and, indeed, the attestation of that individual appears to the deed; but Ram Mohun does not remember whether he was a witness or not; besides, he does not know whether Shuhdeo signed it or not. Ram Mohun Pal another witness to the deed, states that he came to live at Mungrowl about the end of the year 1213 B. S.; that after that, in the month of Kartick of the year which by the shewing of the said witness appears to be 1214 B. S., he signed his name at the desire of Ram Mohun Ghose as a witness to the deed of gift, in a place in the said mouza where several people were assembled, but that Shuhdeo said nothing to induce him to become a witness to the deed; Bhurut Pal, Kewul Pal and Ram Mohun, have all deposed, that the deed was executed in 1212 B. S. and Debee Churn a witness to the deed and summoned by both sides has deposed, that, he, in the year 1214 or 1215 B. S., hearing a noise in the direction of the house of Shuhdeo came out of his own house and heard from several people who were going and coming from thence that the said Shuhdeo had suddenly become senseless; that, at that time, the father of the plaintiffs called to the said witness saying that Ram Mohun Ghose was looking for him; upon which the said witness went to the house of Shuhdeo and that Ram Mohun Ghose there requested him to become a witness to a deed of gift of his property which Shuhdeo had caused to be written; that Shuhdeo was at that time senseless, and that although the said witness called to him repeatedly, he returned no answer; that the said witness, at the desire of Ram Mohun Ghose, signed his name as a witness to the deed, and he some hours after heard of the death of Shuhdeo. The substance of the evidence of Ram Kant is the same as that of the preceding witness. The evidence of the other witnesses is in like manner contradictory. Besides, it appears from the evidence of the witnesses, that, at the death of Shuhdeo, there was a dispute between the plaintiffs and the defendants concerning the burning the body, and the performance of his funeral obsequies; and that the property of the deceased was neither entirely in the possession of the plaintiffs nor entirely in that of the defendants—moreover from an inspection of the deed, it appears that there is no specification of the lands in dispute. It merely specifies lands and other property hereditary or acquired: under these circumstances it is not clearly proved, whether the said deed was executed in 1212 B. S. or at the time when Shuhdeo was dying and senseless.

The signatures to the deed are not legible and it is written in a

manner entirely unusual. Under the foregoing circumstances the Fifth Judge considering that there was no dependence to be placed on the deed of gift on which the claim of the respondents rested, was of opinion that the decree of the Zillah Judge should be reversed with costs, and that if the respondents should, in conformity to the order of the Zillah Judge, have entered into possession of the property in dispute, they should be ousted and the appellants put into possession and that the profits of the estate received by the respondents during their possession should be refunded to the appellants. The Senior Judge coinciding in the above opinion a decree was passed accordingly.

Kounla Kant Ghosal and his brothers being dissatisfied with this decision presented a petition to the Sudder Dewanny Adawlut for the admission of a special appeal. The Second Judge of the Court (O. Smith) deemed it necessary to consult the Hindoo Law officers of the Court previously to passing any order on the application of the petitioners and the following question was accordingly propounded to them.

Goburdhun Nund Gramee died leaving two sons, Nurindra Nityanund Nund Gramee and Seetaram Nund Gramee, as his heirs and representatives. Nurinder Nityanund Nund Gramee died leaving a son, Gopeenath, and Seetaram died leaving a son named Shuhdeo and a daughter, whose name is unknown, as his heirs. Gopeenath died leaving three sons, namely, Ramhuree Nund Gramee, Gourhuree Nund Gramee and Haroo Nund Gramee. Shuhdeo died without issue and his sister, at her death, left an only daughter as her heir. Shuhdeo, subsequently to his sister's death, bestowed a few beegahs of *Bramhotur* and *Devottar* land on his sister's daughter's son (Ramshunker Ghosaul) while his sister's daughter was living, and executed a deed of gift for the same and put the donee into possession of the property, and, three years after this, he died. At the time of the gift Gopeenath Nund Gramee's sons, namely, Ramhuree, Gourhuree and Haroo Nund Gramee were living and still are living, but Gopeenath is dead. A few years after the donor's death the donee died and his sons took possession of the property which had been given. In this case, is the deed of gift executed by Shuhdeo, according to the law as current in Bengal, complete and binding or otherwise? If it be deemed illegal, on whom will the property given devolve?

Reply.—Supposing Goburdhun Nund Gramee to have died leaving two sons Nurindra Nityanund Nund Gramee and Seetaram Nund Gramee as his heirs and Nurindra Nityanund, to have died leaving a son named Gopeenath, and Seetaram also to have died leaving a son named Shuhdeo and a daughter, and Gopeenath to have died leaving three sons, namely, Ramhuree, Gourhuree and Haroo, and supposing Shuhdeo, during his life time, to have given a few beegahs of *Bramhotur* and *Devottar* land to his sister's grandson (Ram Shunker Ghosaul) and to have executed a deed of gift for the same and put the donee into possession of the property and three years afterwards to have died childless; in this case, whether the *Bramhotur* lands, were divided or held in joint tenancy, the gift of his divided share, or in proportion to his share, made by Shuhdeo, is complete and binding according to the law as current

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in Bengal, even though Gopeenath's three sons (Rambhuree and the others abovenamed) were living at the time of the gift and still are alive for the act was done by the true owner who has an exclusive power over his own wealth. But the gift of the *Devottur* land mentioned in the deed of gift cannot be considered as complete and binding, because such land is reserved for the service of the deity exclusively; but it is usual to confer the management of such property on men, and if it be proved that a landed proprietor, having assigned certain lands to be dedicated to the worship of a deity, entrusted the management of such endowed property or the duty of defraying the expenses attendant on the worship of the deity to Sh. hdeo or to his ancestors, and the said Shuhdeo transferred his own power of management to Ram Shunker Ghosal, or if Shuhdeo himself having dedicated certain lands to defray the expenses attendant on the worship of a deity had given to others the power of management, under either of these two circumstances, the assignment is good and valid according to universal custom and it should be upheld as complete and binding. This opinion is consonant to the *Dayabhuga*, *Menu*, the *Vyavaharatutwa*, *Vyavaharamatrika* and other authorities as current in Bengal.

Authorities.

1. The text of *Nareda* cited in the *Dayabhaga* and other law tracts. "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth."
2. *Menu*: "A gift or sale, thus made by any other than the true owner, must, by a settled rule, be considered, in judicial proceedings, as not made."
3. The text of *Nareda* laid down in the *Vyavaharatutwa* and *Vyavaharamatrika*: "The established customs are predominant, for by them is the law ascertained."

On a perusal of the above *Vyavustha*, the Second Judge recorded his opinion that, as it appeared that even supposing the property to have been undivided, the gift by Shuhdeo of a portion not exceeding his own share was valid and that the assignment of endowed property was also valid, and as by the decree of the Provincial Court the petitioners were altogether excluded from the property—and as the question as to whether the property was joint or divided had not been fully enquired into, the case of the petitioners was one which required further investigation and that the appeal should be admitted accordingly. The papers of the case were next laid before the Fifth Judge (A Ross) who not seeing any sufficient reason under the provisions of clause 1, section 2, regulation 26, 1814, for the admission of a special appeal recorded his opinion that the application of the petitioners should be rejected. On the 11th of January 1827, the Third Judge (C. T. Sealy) recorded his opinion that although the pundits had declared the gift to be valid, whether the property was divided or undivided, yet that formed no part of the present question, as the validity of the deed of gift itself had been disallowed in the Court below. Concurring therefore with the Fifth Judge as to the insufficiency of the grounds set forth in the petition it was finally rejected on the above date.

EDWARD BRIGHTMAN (Attorney of JOSEPH BARRETO,
deceased), Appellant,

versus

CASHINATH BUNHOOJEA and RAM DHUN
BUNHOOJEA, (guardians of ANUWDA PERSHAD, a minor
Son of OSHTECHURUN BUNHOOJEA, deceased), and MUDHOO
SOODUN SANDIAL, Respondents.

JAN. 17.

THIS was a suit instituted by the respondents in the Provincial Court of Appeal for the division of Calcutta, on the 22d of May 1819, to recover from Joseph Barreto the mousa of Sooksagur and seventeen other mousas, also the large Chur of Kalespore, in the perguna of Okra and other pergunas, all of which places formed a semindaree alledged to have been purchased by the plaintiffs, at public auction, and of which the yearly produce was estimated at 16,125 Rs. also to recover the sum of 8,489 Rs. 3 anas, 1 gunda, annual compensation for the sayer duties of Sook sagur Gunge; also the sum of 32,409 Rs. 15 anas, 17 gundas, 1 cowree profits appropriated by the defendant altogether 57,024 Rs. 2 anas, 19 gundas, 1 coyree. The plaint set forth that the defendant who had the semindaree in farm for a certain term, of years, on the proclamation of sale of the lands in question being made by the Board of Revenue, fearing lest the purchaser should either eject him from farming the lands or demand a higher jumma, sent in a petition to the said Board, praying that he might be allowed to remain in possession of the lease of the lands till the expiration of the term at the jumma he had theretofore paid; which petition being referred to the Governor General in Council, was granted on the 9th of May, of the same year (1810). The land was bought at the sale by the plaintiffs and Radha Madhubunhoojea. The defendant being present, inserted in the margin of the deed of sale, the conditions regarding himself and his occupation of the land according to his leases. In 1224 B. S. the plaintiffs let the land in question, in farm to Juggut Narain Mookherjea, the lease of the defendant having at that time expired.

The defendant, however, would not allow the said Juggut Narain which had to obtain possession of the land, and the plaintiffs unwilling to enter into a law suit petitioned the Judge of Zillah Nuddea, on the subject and received for answer that if they had any claim to advance they should proceed at law against the defendant. On appeal to the Provincial Court of Calcutta this order of the Zillah Judge was reversed and possession was awafded to the plaintiffs, but this order was afterwards itself reversed on application to the Judges of the Sudder Dewanny Adawlit, and the plaintiffs were left to a regular suit. The defendant in contradiction to his former declarations had set up a claim to an istimraree lease of the land, which he supported by the production of a sumud under the signature of the Governor General; whereas that sumud, was only for one year and did not contain a word of istimraree and to compensation rights. From the terms of that sumud also it was plain that no other sumud existed of a makurarie nature; besides which the defendant had allowed twenty seven years to elapse.

1827. without any application either to the Board of Revenue or the Supreme Government. The plaint concluded by stating that the abovenamed Radha Madub Bunhoojea had sold his share of the property to the plaintiff Mudhoo Soodun Sandial.
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The defendant in reply stated, that Sooksagur was not very long ago an uninhabited and uncultivated jungle; that in the year 1184 B. S. Mr. Crofts and others obtained their leases, one of 5,800 beegahs of jungle land, at a *jumma* of 2,801 Rs. from Rajah Kishen Chunder Rai; another of 3,908 beegahs of jungle, at a *jumma* of 1,954 Rs. and a third of the Chur of Kalepore, at a fixed *jumma* of 75 Rs. from Seeb Chunder Rai, with the sanction of the Supreme Council; and at a great expense proceeded to cultivate and improve the land so acquired. This land together with two hundred beegahs, granted by Kishen Chunder Rai, on a *lakhiraj* lease for building houses and making gardens, &c. was sold by Mr. Crofts to the defendant and Mr Farquharson, for the sum of two lacks of Rs. soon after which the defendant purchased Mr. Farquharson's share and continued to discharge the rents due from the land amounting to 4,830 Rs. up to the year 1193 B. S. In the year 1174 B. S. the land in question was attached by Government and a *perwanna* issued in favor of the defendant, by the Governor General in Council.

The Collector of Nuddea at that time added 374 Rs to the *jumma*, and fixed it a new at 5,204 Rs. Accordingly the defendant for two years paid the *jumma*, increased as above, and received from the Collector signed receipts for the same and afterwards for many years paid the same to Maharajah Eesur Chunder Rai. The plaintiffs also buying the property at auction at first received without objection the fixed rent as above, though afterwards they unjustly proceeded against the defendant for the purpose of ousting him. The insertion of the words *i'jarah meeadee* could not avail against the *sunnu'd* of the Governor General and the plaintiffs had nothing to do with the estate but to receive the fixed rent as above. And since the former possessor of the land could claim nothing but that fixed rent, the plaintiffs who bought the land subsequently could not legally claim any rights except such as had been allowed to and been possessed by the former zemindar, even had there been no *perwanna* in existence. When the proclamation of sale was made, the defendant applied to the Board of Revenue and it was entirely owing to accident and inadvertence that he omitted in his application to mention the *perwanna* of the Governor General in Council, and the settlement made by the Collector, while he mentioned the lease for a certain term. There was some time back no *Gunge* or *Golah* at Sooksagur till Mr. Crofts established them there for the accommodation of the ryots and obtained for them a *sunnu'd* from the Supreme Council. This *Gunge* the zemindar had nothing to do with. The defendant had afterwards laid out a great deal of money in cultivation and in improvement of the said *Gunge*, and had received the profits arising therefrom. In the year 1197 B. S. when the *sayer* duties were resumed, the Governor General in Council, in consideration of the expense which had been incurred by the defendant ordered him a compensation of 8,489 Rs. per annum, conferring upon him for that

purpose, a certain *lakhiraj mehal*, in the Zillah of Dacca, the produce of which as compensation, had regularly been received by him (the defendant), up to that time, and this part of the plaintiff's claim was therefore totally groundless.

The plaintiff rejoined, that the defendant had brought forward the *perwanna* of the Governor General in Council, to prove the *jumma* to be fixed and had attributed the omission of any mention of this *perwanna* to accident and inadvertence. Admitting this to be the case still the defendant had sufficiently proved that the *jumma* was not *istimraree* when he alluded to the circumstance which occurred in 1194 B. S. the raising of his *jumma* by the Collector. The defendant replied to this by repeating his former statement.

On the 20th May 1823, the Second and Officiating Judges of the Calcutta Court of Appeal passed judgment to the following effect. In the deed of sale executed to the plaintiff, by the Board of Revenue, at the time of the purchase of the lands in question, by auction, there was contained a clause reserving to Baretto possession for the unexpired term of his lease, and by an order of the Governor General in Council, the said Baretto was declared entitled to hold the lands till the expiration of the term. From copies of three leases, one signed by Rajah Kishen Churn Rai, and the other two by Seeb Chunder Rai, in favour of Mr. Crofts granting a lease, the first of Sooksagur for 40 years, the other of Kaleekapore, &c. and the whole Chur of Kaleapore, for 33 years, and from other papers it appeared, that the defendant purchased the said leases from Mr. Crofts, as also two hundred beegahs of *lakhiraj* land (concerning which nothing has been alledged by the plaintiffs) to the expiration of the terms expressed in the respective leases. It was clear from the wording of the deed of sale and from the order of Council, that the defendant had no further legal interest in the land, but the plaintiffs who purchasing the zemindaree bought of course all the right and privileges of the former zemindar, were at liberty to take possession of the property. The defendant had attempted to prove the tenure to be *istimraree* by means of the Governor General's *perwanna*, dated December 30th 1787. But that *perwanna* though it stated that if the rents of the land were paid and no oppression exercised over the ryots, the land might be continued to the defendant yearly, by subsequent *annual perwannas*, yet was expressly limited in its own effect to one year; nor was there any other *perwanna* or *sunnud* extant by which a *mekarreerree* tenure could be established. The Government were not competent (especially when leases under the signatures of the Rajah were extant and *unexpired*) to grant away the lands to any person. At the time of the proclamation of sale, the defendant had petitioned the Government to be allowed to remain on the land till the expiration of his lease, which was granted on the report of the Board of Revenue. The statement of the defendant, that it was by accident and inadvertence that no mention was made of the *perwanna*, since insisted upon was not to be attended to; for it was plain that the application was made simply with a view to remain on the premises till the expiration of the lease, nor was it till the lease had

1823.
Edward Brightman,
Attorney,
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and others.

1897. expired and there appeared no other way of claiming the perpetual lease than the *perwaha* was set up as evidence of an *istimraree* tenure. Again no proof of the *istimraree* tenure was to be found in the Collectors accounts relative to the land in question, which the defendant had brought forward. The order of the Governor General in Council certainly had awarded to the defendant 8,489 Rs. per annum, in compensation for the *sayer* duties and considering the expense he had been at on the premises. But when the lease of the land expired, the *Gunge* which was part of the property fell with that property into the hands of another. On the other hand since the *Gunge* was founded and improved at the expense of Mr. Crofts and others, and the former zemindar had no claim to it neither could the plaintiffs (the present zemindars) have any just claim to the said compensation but only to possession of the land on which the *Gunge* stood. On these grounds a decree was given in favour of the plaintiffs by awarding them possession of all the land in dispute, but not the compensation money included in the suit: further the defendant was ordered to refund to the plaintiffs the profits received from the land from the date of the expiration of the leases up to the date of the decree subtracting any sums already paid by him as rents to the plaintiffs, and as no right appeared in either party to compensation on account of *sayer* resumed, it was provided for in the decree that neither the plaintiffs nor defendant should be held entitled thereto, and that a report on the subject should be made to Government. Costs were made payable by the defendant. The defendant appealed to the Sudder Dewanny Adawlut, and, dying soon after, the appeal was carried on by his attorney Edward Brightman. An appeal was also preferred by the plaintiffs against that part of the decree which declared them to have no title to the compensation for *sayer* resumed.

The Second Judge of the Sudder Dewanny Adawlut (C. Smith) thought that the following reasons existed against affirming the decree of the lower Court. *Firstly*, that the claim of the respondents was founded on three Pottahs, one dated the 28th of Asark 1184 B. S. at a yearly rent of 2,801 Rs. the second, dated 9th of Chait 1191 B. S. at a rent of 1,954 Rs. the third dated some time in 1191 B. S. at a rent of 75 Rs. The temporary nature of these Pottahs, was clear from the increase of rent which took place in 1194 B. S., and from a new settlement dated in that year under the signature of the Governor General, of the authenticity of which there could be no doubt. *Secondly*, the settlement was made at a time when the zemindaree was held *Adas* by Government, under the 43d section of Regulation 8, 1793, by which regulation, Government had full power with regard to making a settlement thereof, and by the conditions of the said settlement the grantor and grantee were equally bound. *Thirdly*, the zemindar, when he agreed to the terms of Government and again became possessed of the zemindaree, continued from that time up to the auction, viz. twenty four years to receive without demur the same rent of 5,204 Rs. *Fourthly*, the statement of the respondents that the rent was increased before 1194 B. S. that is before the zemindaree was attached by Go-

vernment was wholly unfounded, for no document existed purporting to relate to an increase of rent. And in all the disputes which came before the Zillah Court of Nuddea, from October 1817, to the decree of the Provincial Court in 1823, no mention of such circumstance was made by the respondents nor any documents brought forward tending to establish the point. As for the papers produced by the respondents in this Court for that purpose, they were altogether unworthy of credit. *Fifthly*, the sunnud of the Governor General in Council, dated 1787, was to this effect "that this sunnud was granted for one year and that in the event of the good behaviour of the grantees in every respect, it might be in the power of Government hereafter to grant him yearly sunnuds on the same terms as the present," of which the meaning evidently was, "As long as you pay the rent and give satisfaction by your conduct this sunnud will be considered perpetual to you and your heirs." *Sixthly*, Mr. Joseph Baretto had performed these conditions as he had never acted in any way against the spirit of them, and therefore the sunnud was still in force. *Seventhly*, though the 5th section of regulation 44, 1793, was to this effect, that when land was put up to auction, in consequence of arrears of revenue, the purchaser had the full right to set aside all leases and Pottahs granted by the former zemindar, and to execute new ones, yet this power did not extend to sunnuds granted by Government while the land was held *khas*. *Eighthly*, in the many papers of Mr. Baretto comprised in the proceedings of the Provincial Court, he (Mr. Baretto) though he had mentioned Pottahs for limited terms had omitted to speak of the sunnud, dated 1797—and it became a question with the opposite party why he had omitted this? To this there might be two answers, either that he did not think proper to do so, or that it was in fact through accident, but the Court in trying this case were not merely to look at what was contained and what was not contained in letters to the Board of Revenue or any other place. Their duty was to search for the truth and to that their decree was limited. *Ninthly*, the decree of the Provincial Court, respecting non-compensation is wrong. They should not have gone farther than dismissing claim to it. *Tenthly*, when the claim of the respondents to the land in dispute was made out to be inadmissible, the claim to the compensation became inadmissible likewise. *Eleventhly*, if the claim to the land was to be admitted, still in the opinion of the Court, the claim to compensation was groundless, because the *Gunge* founded by Mr. Crofts had no existence before the obtaining of the leases for the land; nor had the zemindar ever received any emolument from it. He could not therefore claim compensation for an advantage which it appeared he had never possessed; since the provisions of regulation 28, 1793, only applied to such persons as were injured by the resumption of *sazier* duties and suffered loss thereby. Now it was clear from all the papers, &c. before the Court, that the compensation was given under the following circumstances, viz. Mr. Crofts had founded the *Gunge* and received the *sazier* duties from it; Messrs. Baretto and Farquharson bought the whole property from Mr. Crofts including the *Gunge* with its appendages, for a large sum, no less than two lakhs of rupees. To

*Edward W.
Brighton
Attorney of
Joseph J.
Baretto, Esq.
Cochin
Farquharson,
and others.*

1827.

Edward Brightman
Attorney of
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Cashinauth
Bunhojea,
and others.

Mr. Baretto then was the compensation allowed and it never could have been in the contemplation of Government to continue the compensation yearly to any zemindar into whose hands the lands might fall by the cessation of the lease. Twelfthly, although it appeared on inspection of the deed of auction sale, dated the 28th of January 1814, that the margin contains mention of two leases and of a *perwanna* from Government, dated 21st of March 1785, directing certain merchants to pay the *sayer* duties on their goods to Mr. Charles Crofts, and although this had been construed by the respondents into a proof of their claim to the *sayer* duties, yet the mistaken idea of the respondents was not to influence the Court to award the money in question. Mr. Baretto did not conduct the sale, and even if the Board of Revenue or the Collector had mentioned in it any right especially belonging to him (the said Mr. Baretto) still that could not legally prejudice him; but the deed of sale expressly stated, that the purchaser was the purchaser *only* of the rights of the previous defaulter, i. e. the zemindar. If the lease did cease and the interest of Mr. Baretto in the land did expire still the zemindar (i. e. the new purchasers) could not claim the *sayer* duties; for either the compensation would continue to be paid by Government to Mr. Baretto or would cease altogether and remain in the Company's Treasury.

On these grounds the Second Judge was of opinion that the decree of the lower Court should be reversed with costs, and that the appellant should retain possession of the lands in dispute paying a yearly rent of 5,201 Rs.

The case coming next before the Chief and Fourth Judges W. Leycester and W. Dorin, they expressed their opinion to the following effect on the 23d of January 1827.

The ground taken by Baretto in appeal is in substance that the *sunnud* granted by the Governor General, in the year 1787, superseded the former lease and conferred upon him a perpetual tenure at a fixed rate of *jumma* as assessed by the Collector. It is observable that all the original Pottahs (which specify a limited term and nothing more) had been confirmed by Government on the application of the holders. It is by no means evident that the *sunnud* of the Governor General gave or meant to give any thing like a perpetual tenure at a fixed *jumma*, nor indeed does it appear; even had it been intended, how the Government could assume the right of alienating altogether any right appertaining to the land-holder. That the tenure has all along been viewed by Government and by Baretto, since the *khas* settlement ceased, as limited in its nature and to cease at the expiration of the 40 years from the date of the first of the three Pottahs, is inferrible from the applications of Baretto between the years 1790 and 1810, and the orders passed conformably by Government in his favour.

The only thing which can throw a difficulty on the question, in the opinion of the Court, is the circumstance of the *jumma* having been raised by the Collector during the *khas* management in 1794, from 4,830 Rs. (the sum specified in the Pottahs) to 5,204 Rs. and having been allowed to remain at that rate afterwards by the zemindar; and when the *khas* management had ceased; yet as it is clear that a limited lease was still looked to uninterruptedly (and

the precaution taken by Baretto for the event of an auction sale (to evince it), there does not exist any presumptive evidence of an agreement or understanding between the parties that the tenure or the rent should be perpetuated and be co-existent with the zemindaree or that the tenure ever changed its character from a limited lease to a permanent one or to a talook or any other species of tenure of more permanent interest. There is nothing in the plea of ignorance or error on the part of Baretto. Of what was he ignorant? That he had acquired a title as against the zemindar? It does not appear that under the *perwanna* he acquired such title. And immediately the *khas* management ceased, the zemindar might, if he chose, have turned out Baretto, if the latter pretended to be any thing more than farmer, and declined holding as such. And afterwards again, if the farmer, presuming on the alteration of rent (which seems to have gone on *sub-silentio* of both parties) had openly set up as a *mokurrereedar*, the zemindar would probably have resisted any such claim. But as Baretto all along admitted he was a farmer for a specified term, the Zemindar cannot be presumed to have viewed him as any thing else. And the zemindar too, under any other view, might with equal justice plead error on his own part, and assert his never having contemplated that these lands should be held for ever at a rate of rent not equal to a third of their produce.

The small increase of rent, which forms the only point resembling a difficulty may be referred to mutual acquiescence. Considering the profits which must have arisen from the farm of this estate, it was of no consequence at all as to amount. Whether or not it might be reclaimed as erroneously paid, it is not necessary now to give an opinion.

The main omission of Baretto seems to have been a neglect to stipulate in time with the zemindar (who, some years before the lease was out, might probably have agreed to it) for continuance as a tenant at the ordinary rates of the *pergunna*.

On the whole, as Baretto, if he acquired any thing beyond the farm, must have acquired it either by grant from Government, or by agreement express or implied of the zemindar; and as it appears he did neither; the decree on this part of the question should be affirmed.

Under this view of the case the Judges aforesaid affirmed so much of the decree of the Court below as related to possession of the lands and so much of it as dismissed the claim to compensation, but no more.

With respect to the appeal preferred relative to the compensation for *sayer* on account of the *Sooksagur Gunge*, the abovenamed Judges expressed themselves to the following effect. "The plaintiffs (the present zemindars) are clearly not entitled to *sayer*. The *Gunge* may be considered as a tree planted by the farmer (Crofts) and nourished by his care and industry and not by any act of the zemindar who has no title to compensation, but may make what he can of the ground rents. The point before the Provincial Court however was simply whether or no the plaintiffs were entitled to compensation and they had no right to go further."

The appeal was therefore dismissed with costs.

1867.
Edward
Brightman
Attorney of
Joseph
Baretto, &
Cochinagh
Bunhoogen,
and others.

1897.
Feb. 6th.

SHEIKH BURKUT ALI and SHEOPERSHAD, Appellants;
versus
SHEIKH KHODA BUKSH, KADIR BUKSH, SHEIKH ALI BUKSH, and MUSSUMMAUT KHEIRUN;
MUSSUMMAUT BECHUN, and MUSSUMMAUT BOOLUN, Respondents.

In a suit for lands fraudulently alienated by the manager as rent free, since the Company's accession to the Dewanny, held that the rules relative to resumption of rent free tenures do not apply.

THIS suit was instituted by Mussummaut Fueeha, the mother of the respondents, on the 13th of April 1819, in the Patna City Court, against Gumbheer Singh, (father of Sheo Pershad) and Sheikh Burkut Ali, Pershad, Ramdial, Seetaram, and Bhowanee Pershad, to recover possession of about 139 bengahs and 12 biswahs of land, situated in mouza Imdipoor Sarandee, a nizamul village in the pargana of Phoolwaree. The suit was laid at 600 Rs, three times the annual produce. It was set forth in the plaint, that Moohommud Wulee, the father of the plaintiff, at his death, left Mussummaut Saliha (his widow) and the plaintiff (his daughter), heirs of one-half of his *Milkseut* or hereditary estate, and the whole of the *mokurreres istimraree* (or perpetual tenure with a fixed rent) mouza of Imdipoor Sarandee, a nizamul village, acquired by himself. The mother of the plaintiff, in consequence of being a recluse or *Purda nishkeen*, in 1172, F. S. appointed Sheikh Zein-oil Abideen, and after him, in the year 1181 F. S., Syud Wulee Aulum, to manage the property, and this person paid to the then existing Government the revenue of the mouza, and to the mother of the plaintiff the profits, after deducting his own expenses. The said Syud died in 1201 F. S. and after that Mussummaut Joohin, his daughter, and Gholam Kadir Buksh, her husband, ceased to pay the profits of the mouza. Accordingly the mother of the plaintiff brought an action against them in the City Court of Patna, claiming one-half of the hereditary estate, and the *mokurreres mouza* above alluded to, and, although the defendants averred in reply to this claim, that the zamindar sold the said mouza to Sheikh Zein-oil Abideen and that the latter sold it to Radhakaunt and Radhakaunt to Syud Wulee Aulum, from whom they derived, yet, as they could not substantiate this plea, a decree was passed in favour of the plaintiff, which was confirmed in the Provincial Court, on appeal made by the defendants. The plaint went on further to state, that the plaintiff, after the death of her mother in the month of Chait, 1220 F. S. obtained possession of one-half of the hereditary estate, and the *mokurreres istimraree mouza*, as decreed by the two Courts, but that the defendants were still in possession of the land now claimed, and would not give it up to the plaintiff, whencefore this present action had been brought at this stage of the proceedings, the plaintiff died, and Sheikh Khoda Buksh, Sheikh Kadir Buksh, and Sheikh Ali Buksh, her sons, and Mussummaut Kheirun, Bechun, and Boolun, her daughters became her legal heirs and representatives. The defendants (except Bhowanee Pershad who did not attend) maintained in answer that so much time had elapsed previous to the institution of this suit that the right of action was barred by the rules of limitation for

the hearing of suit and further averred that the land in dispute was exempt from Government Revenue, and that the whole was divided into three shares, two of which belonged to Mussumant Guaseson, the mother of Fakir Chaud, and one to Gumbhoor Singh the first defendant, having been transferred to them for a consideration by Zeyn-ool Abiddeen. Mussumant Guaseson gave a lease in perpetuity of her two shares from the year 1217, to the first defendant at a fixed jumma of 50 Rs. per acreum, and the ditto defendant, again, granted the three shares from 1221 P. S. and others to Sheikh Burkut Ali the other defendant at a fixed annual jumma of 150 Rs.—Sheikh Burkut Ali (the defendant) continued has still possession of the same, and pays the jumma to the first defendant, and the latter pays out of it 40 Rs. yearly to Mussumant Paran the granddaughter of Guaseson, (deceased), for her two shares. These statements may be proved by reference to three decrees of the Zillah Court bearing dates the 13th of January 1808, 29th of June 1809, 28th of November 1816, and other documents. The other defendants, Berabah Ramdial and Seetaram have no connexion with the land in dispute.

The cause came to a hearing on the 18th of May 1820, before the Judge of the City Court, who recorded his judgment to the following effect. "Since it is evident, from the defendants' statements, that the land in dispute is situated within the boundaries of the mouza of Imadpoor Sarandee, and it is clear, that the said mouza is the *milkereet* or hereditary estate of the plaintiff; as the defendants have brought forward no *sunnud* or other document to prove the exemption of any part of it from the payment of revenue, and the rules of regulation 19, 1793, do not recognize the validity of such rent free tenures, the decrees of Court presented by the defendants, which are brought forward to prove their possession of the land in dispute, cannot in any way substantiate their right to the hereditary estates and as any such alienation from the rent roll would be illegal, the Court are of opinion, that the plaintiff, to whom the said mouza belongs, and with whose ancestors the settlement of the whole of the lands was made, are clearly entitled to obtain judgment." A decree was therefore passed in favour of the plaintiff adjudging him the possession of 139 bengahs, 12 biswahs of land, situated within the boundaries of the mouza of Imadpoor Sarandee, as claimed by him—defendants to pay costs.

The defendants being dissatisfied with this decision appealed to the Provincial Court. Gumbhoor Singh (one of the defendants) died in this interval, and Sheo Berabah, his son, succeeded him as his legal heir, and representative. The respondents, though notice was duly served upon them, did not attend and the cause was brought before the Officiating Judge of the Provincial Court, on the 28th of June 1820, when it appearing to him, that as there was no evidence forthcoming in the case and as the alleged transfer by Zeyn-ool Abiddeen took place before the Company's accession to the Dewanry when he could have no power to alienate land, or a rent-free property, the decree of the Zillah Court was confirmed and it was affirmed accordingly with costs payable by the appellants. Sheikh Burkut Ali and Sheo Berabah being dissatisfied with the said decision,

1827. A petition for a special appeal to the Court of Sudder Dewanny Adawlut, which was admitted for the reasons set forth in the proceedings, dated the 16th of June, 2d of July 1823, and 28th of December, of the same year. The case came on before the Chief and Fourth Judges of the Sudder Dewanny Adawlut (W. Leycester and W. Dorrit), and on the 6th of February 1827, they passed judgment to the following effect. "The chief objections of the appellants are first—that this was not a suit for resumption of land but for possession; and, secondly, that the defendants having been very long possessed of the lands, the action is barred by lapse of time under regulation 8, 1793, and regulation 2, 1805.

But if a man while in charge of lands on the part of another, fraudulently alien part of them, and pretend that they are rent free, the suit to recover them becomes a question of *meum* and *tuum*, not of resumption or non-resumption,—and if the lands now claimed form a part of the *nizamut* lands, which they are presumed to do, they should have passed to the claimant under the decree of the Patna City Court, dated in 1808. The claim for possession is good and not barred by time and the decree of the Courts below should be left untouched—and it should be remarked that these are not lands alienated by a grant valid or invalid, as no grant at all is alleged."

The decrees of the Courts below were accordingly affirmed with costs.

1827. **MUSSUMMAUT KHANUM JAN** (on her own account and on behalf of her minor son Moohummud Hoosain Khan), Appellant,
Feb. 13th. *versus*

MUSSUMMAUT JAN BEEBEE and SHEIKH KUMMOO and RUHUM ALI Sons and BUSEERUN, WUJEEHUN and MISRUN; Daughters of MUSSUMMAUT MUNEEFAH, deceased, Respondents.

According to the Moohummudan law, in a gift of portable property to two persons, division is essential prior to delivery. Deeds of release founded on an invalid deed of

THIS suit was instituted by Jan Beebes and Mussummaut Muneebah, as Paupers in the Patna Provincial Court, on the 30th of April 1814, against Fyskhan and Kadirbuksh Khan, for possession of one-half of mouza Nynes and thirty-one other villages in parganya Bal, &c Zillah Sarun and Sircar Chumparun, laying their action at Rs. 13,526 annual produce; and to recover the sum of Rs. 60,050, being estimated as a moiety of the mesne profits derived therefrom from 1211 to 1220 F. S. inclusive—total Rs. 68,577.

The plaint set forth that Mussummaut Nooree, died in the end of 1209 F. S. possessed of the above villages and of houses, jewels, and other personal property, leaving her two daughters (the plaintiffs) and one son Fyskhan, her heirs; and that as the defendants had taken advantage of their helplessness and infirmities and had

seized the whole estate of the plaintiffs, they postponing their claim to a part of the personal property, now sued as by law entitled to recover two-fourths of the whole of the landed estate which belonged to their mother.

The defendants in reply denied the plaintiff's claim, and stated, that Mussummaut Nooroo had in the year 1214 A. H. (corresponding with 1207 F. S.) voluntarily made a gift of all the houses, jewels, and furniture, &c. in her possession equally to her son (the defendant Fyzkhan) and her grandson, (the defendant Kadir Buksh Khan) had executed a *Tumdeeknama* or deed of gift to them authenticated by the signature of the Register of Zillah, Sarua, the seal of the parguna Cazee and the attestations of the plaintiffs and other respectable persons, had divided and put them respectively in possession of the said property during her own life time, and duly continued, in the Collector of Sarua's office, their names which she had already in 1206 F. S. registered in the place of Imambuksh, her eldest son; at the same time instructing them to pay to each of the plaintiffs the sum of Rs. 1000 each. The plaintiffs accordingly on receiving the above sums executed a deed, dated the 17th of *Rubee-oo-saneh* 1208 F. S. (17th September 1800), authenticated by the signature of the Register, the seal of the Cazee and the attestation of witnesses, acknowledging the receipt of Rs. 1000 each, and the validity of the *Tumdeeknama* and foregoing all further claims. As it was clear from the deed executed by the plaintiffs that they had no claim, the assignment by the proprietor of the property, while alive, clearly removed the possibility of her having left any estate on her death and consequently the claim preferred by the plaintiffs under the idea that the deceased had left an estate and that they were legally entitled to a portion of it was unfounded and illusory. In consequence, moreover, of the lapse of twelve years the present suit was inadmissible under the provisions of section 3, regulation 2, 1806—and as the plaintiffs had admitted the right of the defendant Fyzkhan to a moiety of the villages in dispute and he was only in possession of such moiety, the present suit must have been preferred against him solely from vexatious motives.

The case being brought before the First Judge of the Provincial Court, on the 13th of January 1819, the following question was propounded for the opinion of Moohummud Jumal Ali, the Cazee of the Court.

Mussummaut Nooroo executes a deed of gift of all her real and personal property in favour of Fyzkhan and Kadirbuksh Khan, and empowers them to divide it—and a division accordingly takes place, two or three months after, between Fyzkhan and Kadirbuksh Khan. Is such division legal? or is it essential to the validity of the deed of gift that the division should have taken place simultaneously with the transfer?

The following opinion was submitted in reply on the 18th of the same month. According to law, divisible property must either be divided at the time when a gift thereof is made to two persons, or the donor must, immediately after the gift has been made, and before the property has been actually made over, divide and present it to the donees, in order that the objection of confusion may

1827. He avoided and full and complete delivery obtained; which is essential to the validity of a gift. Under these circumstances the present transaction is invalid, inasmuch as the given property was divided between Fyzkhan and Kadirbuksh Khan, two or three months after the execution of the deed of gift with the permission of the donor Musumman Nooro. To render it valid it was essential that the delivery and the division should have been simultaneous.

The law officer of the Zillah Court of Chittagond, having been consulted as to this question, maintained that the proceeding was valid and that the authority for making the division granted by the widow was sufficient to legalize the gift, although such division took place two or three months after the transfer and was carried into effect by the donees.

Subsequently, in conformity to the order contained in the Courts proceedings of the 15th July 1819, Mbulovee Abbas Ali the Moofsee of the Court submitted the following *futwa* in reply to the above interrogatories on the 2d of August 1849.

The undefined gift of divisible property is illegal, and, after a gift of this general nature, if the donor personally divide and make over the property, and the donee come into possession thereof, respectively, such a transaction is clearly unauthorized.

Authorities.—*Hidayat* and other works "possession completes gift and must be definite."

"If the donor divides and delivers over the given property to the donees, such transfer is legal." "It therefore follows that possession of undivided property does not constitute the donee proprietor thereof."

Commentary on the *Buhri Razik*.

Again—"If a person give half a house to another, but does not deliver it over into his possession: and subsequently give him the other half, making over the whole dwelling to him—such gift is legal."

Again—"If a person give half a house to another and make over possession to him—and subsequently give him the other half—both acts are void." It is therefore clear that possession of an indefinite share nullifies a gift; for the disputes arising from indefinite gift and possession are interminable, extend beyond the gift itself, and are the means of invalidating it. It would appear from the interrogatories of the Court that Musumman Nooro made an indefinite gift of her property to Fyzkhan and Kadirbuksh Khan, and granted them permission to divide it, that the donees were seized of the said property indefinitely, and after two or three months divided it between themselves. Such gift and certain being indefinite and tending to disputes is invalid; and as the authorities adduced above do not admit that permission granted by the donor to the donees to divide the property is sufficient to legalize an indefinite gift and as the kind of gift to which the question of the Court refers is certainly included under the head of indefinite gifts which are thereby declared illegal, it cannot justly be maintained that the gift is legal, as, by this unauthorized opinion, the heirs would be deprived of their rights which are so clearly defined by the law.

On the 26th of April 1821, the following questions were separately propounded to Mofteez Moohammed Juttal Ali, Charr and Abbas Ali, Moftees of the Court.

The plaintiffs, Musummaut Jan Beebee and Muneebah, during the life time of their mother, execute a deed in favour of two other heirs, renouncing their right of inheritance to their mother's property. They each received one thousand Rs. from the person in whose favour they executed the deed, and for a period of nearly twelve years after their mother's death, they advanced no claim but ultimately sued for their legal shares of the property left by their mother. An alleged deed of gift by the mother to the persons in whose favour the renunciation was made is proved on investigation to be void. Under these circumstances, will the deed of renunciation executed by the women be any bar to their present claim?

The following was the reply of Mofteez Juttal Ali.

If, on examination, the original deed of gift executed by Musummaut Nooro in favour of the defendants and alluded to in the deed of renunciation proves void, the latter must likewise be considered null and void; inasmuch as the renunciation of the claim to a daughter's share originated in the deed of gift therein alluded to. Under these circumstances therefore the fact of Jan Beebee and Musummaut Muneebah having, during their mother's life time, executed a deed of renunciation, and, for nearly twelve years after her death, failed to assert their claims, can in no way nullify their title to the portion allowed them by the law.

The following reply was submitted by Mofteez Abbas Ali.

"Renunciation implies the yielding up a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that, during the life time of the mother, the daughters have no right of inheritance and their claim on that account is not maintainable against any person during her life time. It follows therefore that this renunciation during the mother's life time of the daughter's shares is null and void, it being in point of fact giving up that which had no existence. Such act cannot consequently invalidate the right of inheritance superventient on the mother's death or be any bar to their claim of the estate left by her. The omission to advance a claim for nearly twelve years is no legal bar to the ultimate admission of such claim."

Musummaut Muneebah, one of the plaintiffs, was succeeded on her death by her sons Sheikh Qumroo and Sheikh Ruhum Ali and her daughters, Basserrat Wysehun and Miran.

Musummaut Khanem Jan on her own behalf and on account of her minor son Moohammed Hoosain Khan, became the representative of the defendant Kadir Bukeh Khan on his demise.

On the 5th of December 1821, the First Judge of the Provincial Court observed, that the execution of the deed of gift in favour of the defendant by Musummaut Nooro and of the deed of renunciation by Musummaut Muneebah and Jan Beebee, as well as their receipts for Rs. 1000 each, had been proved; but that it appeared from the answers of the Charr and Mofteez of the Court, that the deed of gift, having been indefinite, was invalid,

Ans.

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maut Jan
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the permission granted by Mussummaut Nooroo to the defendants Fyzkhan, and Kadir, Bukh Khan to divide the property being insufficient to legalize it—and that the deed of gift and the renunciation of his right by an heir previous to the death of the person from whom he inherits being void, the deed of renunciation executed by Mussummaut Muneebah and Jan Beebee were likewise invalid.

With respect to the mesne profits, however, of the village in dispute the Judge observed that the amount of them had not been exactly proved. He therefore passed a decree ordering the estate of the late Mussummaut Nooroo to be divided into four parts and the plaintiffs to be put in possession and registered as proprietors of one moiety of the villages in dispute and directing that in the event of the defendants having, subsequent to the institution of the present suit, mortgaged or conditionally sold any of the above villages and yielded up possession, the plaintiff's should receive one-half of the monies advanced on such mortgage or conditional sale—the Court would not entertain the plaintiff's claim to Rs. 50,050, as the mesne profits of the village from 1211 to 1220 F. S., but they were declared to be at liberty, after having obtained possession of the villages claimed, to sue the defendants *de novo* for the amount. As the defendants had not stated the amount of the profits of the above lands, they were made liable for all costs.

Mussummaut Khanum Jan appealed to the Court of Sudder Dewanny Adawlut, on her own account and on behalf of her minor son Moohummud Hosein Khan for Rs 12,479, three times the *malgoozaree* of the villages in dispute. — With the exception of Ruhun Ali who had died, all the other respondents appeared to answer the appeal.

The case originally came before the Chief and Fourth Judges (W. Leycester and W. Dorin), on the 15th, 22d, 23d, and 27th of January 1827, when all the papers having been read, it was considered expedient, before passing any final judgment, to lay before the law officers of this Court with the exception of *Mooftee* Abbas Ali who was formerly *Mooftee* of the Court of Appeal, the deed of gift and renunciation, together with the interrogatories propounded to and the replies submitted by the *Casee* and *Mooftee* of the Provincial Court, relative thereto for their opinion, whether or not the above replies were consonant to the provisions of the Moohummudan law.

The law officers of the Sudder Dewanny Adawlut having declared in favour of the accuracy of the opinions delivered in the Provincial Court, the case was again brought before the same Judges, on the 13th of February, who considered it unnecessary to propound any further questions to their law officers, being of opinion that the villages in dispute were the estate left by Mussummaut Nooroo and that she was always in possession thereof, a fact which, the Court conceived, would be still more favourable to the claim and against the case of the appellant. Moreover the respondents in their reply to the grounds of appeal still persisted that they never in reality received the sum of Rs. 1000, specified in the deed; and the Court considered that the receipt of the money had not been satisfactorily proved, even allowing the execution of the instrument.

On this ground the Court resisted a claim preferred by the appellant that those two sums of 1000 Rs. each, should be refunded by the respondents. Whether the women received those sums to defray the expenses of their support was another question which the Court did not think proper to go into, there being still an open account between the parties under the decree of the Provincial Court.

A decree was accordingly passed affirming the decision of the Provincial Court and dismissing the appeal with costs.

KULIAN CHOWDHREE, Appellant,

versus

RAJA IKBAL ALI, Respondent.

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Feb. 19.

THIS suit was originally brought by Gunga Ram Chowdhree, Held that, in form of pauperis, against Raja Kadir Ali, in the Zillah Court of Bhaugulpore, on the 24th of June 1814, to recover the sum of 1,300 Rs. being the amount of Chowdhree, Mokuddimes and Chukladaree dues from the perganna of Jehangeerabad from the beginning of the year 1218, till 1221 F. S.

The plaint set forth, that the proprietary or zemindaree right to the said perganna belonged to Fuzl Ali, Anund Chund, Balik Ram and Bunseedur zemindars; that on the death of Balik Ram and Bunseedur, he (the plaintiff) inherited their shares and obtained the Chowdhree and Mokuddimes dues and other zemindaree rights; that the total amount of the dues on the said perganna from the beginning of the year 1218 till 1221 F. S. was 2,600 Rs. and after deducting the sum of 1,300 Rs. as the share of Anund Chund and the others, the remainder which is the sum claimed, was due to the plaintiff; that these dues were paid to the plaintiff till the year 1217 F. S. by the defendant, (the zemindar of the mehals of Khurugpore), with whom a settlement for the said perganna had been concluded, but that since the year 1218 F. S. the payment of those dues had been discontinued.

Raja Kadir Ali alledged in defence, that, the perganna of Jehangeerabad, beside all the mehals of Khurugpore was his hereditary zemindaree; that his ancestors were possessed of it in virtue of grants by former Governments; that on the death of his grandfather and father, those grants were confirmed in his person in the year 1188, by the Governor General in Council; and that from that time till the present, both before the decennial settlement and after its conclusion, the management of the said estate had been conducted by him. And that as he could not collect the revenue of all the mehals himself, he (as his ancestors did before) appointed Chowdhrees and Mokuddimes as his gamashas, who as long as they

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received in his service, received, at the end of every year, such amount of fees as he thought proper to fix; that Balik Ram and Bunseedhur were appointed by him and remained in his service till their death, always receiving such fees as he thought fit to allow; that on their death other persons were appointed to their office, who are at present in the receipt of the fixed dues; that the plaintiff is neither the heir of Balik Ram nor of Bunseedhur, nor can the office of a servant be claimed as hereditary. The *gomasthas* of perganna Lakhunpora, another *mehal* of the same estate, considered themselves, similarly to the plaintiff, invested with proprietary right, and thereupon instituted a suit to recover the *Chowdhrees*, *Mokuddimee* and other proprietary dues, when, on a production of the grant of the Supreme Council, and the other evidence brought forward by the defendant, their suit was dismissed. Besides, if the plaintiff had any proprietary right to the perganna of Johangeerabad, he would have objected to the confirmation of the grant to the defendant at the time of its being made; and had Balik Ram and Bunseedhur been the proprietors of the land, they would have sued as proprietors, in the former boundary dispute and when they did not receive the *Mokuddimee* dues from Omario Singh, they would have instituted a suit against him as farmer of the said perganna, instead of leaving this task to him (the defendant) and lastly, if the defendant was not the proprietor, the Collector would not have paid him the amount of the purchase money of 6,000 *beegahs* bought by him for invalid sepoys.

On the death of the said Gunga Ram, his brother Kulian carried on this suit. The claim was dismissed by the Judge of the Zillah Court, on the 7th of July 1818, on the following grounds. In both the *sunnuds* produced by the defendant, the whole of the *mehals* of Khurugpore and the perganna of Johangeerabad are entered as his zemindaree. Agreeably to those *sunnuds* the defendant is in possession of the *mehals* as zemindar, in the same manner as his ancestors were before him and both before and since the perpetual settlement has regularly continued to pay the revenue due to Government. In the *mehals* of the defendant's zemindaree it is customary for him to appoint *Chowdhrees* and *Mohuddims* for the purpose of superintending the cultivation of the land as his *gomasthas* and they receive wages from him for their services every year according to the pleasure of the defendant, and this is evident from the decrees exhibited by the defendant. As to the decrees exhibited by the plaintiff they seem to be in effect similar to the one concerning the *Mokuddimee* right of Lakhapore. Of this the Court has no doubt, and if there was a doubt it could not operate to defeat the other evidence of the defendant. If the plaintiff was, in his own right, the zemindar of the perganna he would have brought forward some grants or title deeds worthy of being attended to, and would, certainly, when the grants were confirmed in the name of the defendant, have protested against them. The deed of sale of the land for invalid soldiers was signed by the defendant, and when brought to the Collector under his signature was approved of, and the amount paid to him. It is evident, also, from the decree produced by the

Defendant, that he obtained a decision in his favour in a suit which he brought against Omrao Singh, the zamindar for the recovery of the zamindarie dues of the said pargana from the beginning of Chaitra 1181, to the end of 1195 F. S. and that the costs of suit, Raja Kadir Ali, is the boundary disputes in the neighbourhood of that place have hitherto from time immemorial been paid by the defendant and have never been demanded from the plaintiff. Bunseedhur and the others received the pay for their service so long as they were the gomashas of the zamindar of the pargana; but any person appointed by the defendant to that situation receives similar compensation and the plaintiff has no exclusive claim to it.

Kulian Chowdhree appealed against this decision to the Provincial Court at Moorshedabad, and Raja Kadir Ali having died in the interval, the suit was defended by his son Raja Ikbai Ali. The case came before the First Judge of that Court, on the 20th of July 1822, and he recorded his opinion to the following purport:— “Although it is ordered in the decision of the case Fouzi Ali, Anund Chund, Balik Ram and Bunsedhur plaintiff, versus Raja Kadir Ali defendant, dated the 29th of April 1794, that Raja Kadir Ali should give the zamindarie dues of pargana Jahanzeerabad as formerly to Balik Ram, and the rest; yet it nevertheless is very plain, from the said decision, that the claim of the plaintiff to have the settlement of the said pargana made with himself was dismissed and that the settlement was concluded with Raja Kadir Ali, in the year 1188 F. S. The order for the payment of the dues to Bunseedhur and the rest was issued merely on the ground that the ancestors of Bunseedhur himself, and the rest had received the dues up to the year 1199 F. S., and up to that time no one had been recognized as zamindar. It did not appear that Bunseedhur and the rest had any claim but that of service or that they were entitled to receive the dues on any other ground than that of compensation for service or wages. In the case of Rung Lal, appellant and Ramanath, respondent, and other cases between *Maliks* and *Chowdhrees* and *Mokuddims*, in the Zillah of Bhaugulpore, appealed to this Court, it has been determined that on a settlement being concluded with the *Maliks*, the title of the *Mokuddims* and *Chowdhrees* to receive dues ceases. The claims of these individuals rested on the same grounds as those brought forward in the present suit. They may be said to have been dispossessed by Government from the management of the property. The case Rung Lal, versus Ramanath was appealed to the Sudder Dewanny Adawlut, and the decision of this Court was affirmed thereby showing that the order of former Judges for discontinuing payment of *Chowdhree* dues was held to be right by the superior Court. The decision of the Zillah Court was therefore affirmed and the costs charged to the appellants.”

On this the appellants filed a petition for the admission of a special appeal to the Sudder Dewanny Adawlut, which, under the circumstances of the case, was admitted. The case came to hearing before the Chief and Fourth Judges (W. Leycester and W. Doris), and on the 19th of February 1827, they recorded their opinion in the following terms. “We do not see any reason for reversing the decision of the Court of Appeal for the suit in the

1827. In this case, to recover possession of the perguntas in virtue of proprietary right, but to recover certain dues called *Mokuddimes*, *Chowdhryee* and *Chhildarree*; and a suit of this description will not lie against any zemindar since the conclusion of the perpetual settlement. And although the appellant brings forward by way of proof, the decision of the Judge of Bhaugulpore, of the 29th of April 1794, in the case of Fuze Ali, and others, *versus* Raja Kadir Ali; that cannot benefit his claim; since Gunga Ram the original plaintiff in this was not one of the plaintiffs in that case, and the decree passed in that case was certainly erroneous if the purport of it was other than to compensate the plaintiffs for past service; and admitting that that decision, whether right or wrong, should be maintained, still the order therein contained, would not apply to any but the plaintiffs in that case and cannot at present benefit any one but them so as to authorize a continuation of the payment of the same dues to other parties. Besides, in the aforementioned case, decided by the Judge of Bhaugulpore, the suit instituted by the plaintiffs was to recover possession of a zemindaree and to have the settlement concluded with the plaintiffs. After dismissing the suit an order was recorded that the plaintiffs should receive *Mokuddimes* dues which involved a decree of something which formed no part of the subject of the suit." Under these circumstances and with reference to the decree of this Court, dated the 20th of February 1826, the decrees of the inferior Courts were affirmed with costs.

RAJA GIRDHUR NARAIN, BABOO HURBUNS NARAIN,
BABOO OODWUNT NARAIN, Appellants,

versus
RAJA CHUTR SINGH, Respondent.

THIS suit was instituted by the respondent, who brought an action against the Collector of Tirhoot, Raja Girdhur Narain and Bhugwut Narain, in the Provincial Court of Patna, on the 22d of May 1820, to recover possession of the mouzas Kurhhia and Chicheria bazaar, parganna Puchoo, in Zillah Tirhoot. The suit was laid at 63,000 Rs. being eighteen times the annual profits of the lands claimed. The plaint set forth that the abovementioned mouzas were conferred by the grant of Aliverdi Khan upon Nurinder Singh, the uncle of the Maharaja Madhoo Singh, father of the plaintiff, for himself and his descendants from the year 1181, F. S. The Maharaja enjoyed the property during his life time and at his death it devolved on Maharaja Pertab Singh, the uncle of the plaintiff. From the year 1175 to 1202 F. S., the accession sum of 2,500 Rs. in cash, was paid according to the settlement of Gopal Singh, the Naib of the Nuwab Moozdar Jung the Jagadar of the estate, annually to Maharaja Pertab Singh and at his death to Maharaja Madhoo Singh in lieu of the nankar deriveable from the produce. In the year 1203 F. S., after the attachment of the estate of the abovementioned Nuwab, the stipend was discontinued and the mouzas Kurhhia and Chicheria were given over to the plaintiff's father's possession as nankar and the mouza of Jynuggur (at the request of his father) to Ranees Pudmawtee, the wife of Maharaja Nurinder Singh, according to the order of the Governor General in Council and the Board of Revenue. The order for making over the mouzas to his father, was dated 1st February 1796, but the stipend was paid in money until the year 1206 F. S., from the Treasury of the Collector. In the year 1207 F. S., a second order arrived to deliver possession of the mouzas as nankar and to discontinue the money payment; agreeably to which an umuktustuk, without or order for possession, was issued from the Collector's office in reference to the favour of his father, and from the time of his death, the plaintiff had been in possession of the nankar of those mouzas, as might be proved by reference to the records of the Collector's office for the years 1198-9, &c. A copy of the proceedings of the Collector of Tirhoot, dated the 10th of August 1808, would show that agreeably to the order of the Board of Revenue, dated March 9th 1804, a petition preferred by Girdhur Narain concerning these same mouzas was rejected and yet the Collector made a settlement for them with the said Girdhur Narain, in the year 1815. The plaintiff remonstrated against this arrangement, but without effect, the settlement of the mouzas with the defendants having been sanctioned and confirmed by the Board of Revenue. In fine, since the said mouzas had been in the possession of the plaintiff and his ancestors for sixty-five years before the accession of the Company to the Dewanny, and after that possession was confirmed by the Governor General in Council and the Board of Revenue, he founded his claim on the 2d

of an illegal resumption of two mouzas which had been conferred as an hereditary rent free tenure on the ancestor of the claimant before the Company's accession to the Dewanny, it was held by the Court of Sudder Dewanny Adawlut that the claimant was entitled not only to the Government share of the rents but to the absolute possession of the lands, in whomsoever originated the grant having been unlimited: although at one time a money payment had been made apparently by consent of the grantee.

1827. section of regulation 19, 1793, which prescribes that those lands which may have been granted before August 1765, shall not be resumed.

Raja Girdhur Narain and others, v. Raja Chutur Singh. The Collector's reply was to the following effect. The claim of the plaintiff is founded on the provisions of section 2, regulation 19, 1793, but the rules in question do not apply to the case for the following reasons. The villages claimed together with other villages were granted to Nurinder Singh, deceased, in virtue of his zemindaree rights, by former authorities, and agreeably to sections 37 and 38, regulation 8, 1793, the lands are resumable. Besides in the year 1780, the Patna Council decided that the *sunnud* was not hereditary. Agreeably to this decision all the lands contained in Nurinder Singh's *sunnud* were resumed excepting *mouza* Jynuggur, which was also resumed after the death of that individual's widow. The order of Government to give up possession of the villages sued for, which was issued without due knowledge of the state of the case, is not sufficient to establish the claim of the plaintiff.

Raja Girdhur Narain and Baboo Bhagwut Narain, replied by denying the authenticity of the alledged grant, which they maintained would have been before produced by the plaintiff or his ancestors had it existed. And admitting that it did exist in the name of Nurinder Singh, they further maintained that it could not avail the plaintiff, as neither he nor his ancestors could be ranked among the *fuzrundan* or lineal descendants of the grantee, as was evident from the petition of the widow of Raja Nurinder Singh, which had been filed in the Court; and as the villages claimed were, on the death of Nurinder Singh, resumed by the proprietor of the estate and after that by the Collector, the plea of the plaintiff's family having been in possession of the property claimed without interruption must be held to be groundless and futile. The lands in question were liable to resumption under section 2, regulation 19, 1793, and also, by sections 37 and 38, regulation 8, 1793, it was beyond the competency of a Court of Judicature to pass a decree exempting the lands from assessment. The Collector Mr. Chamberlayne, in conformity to the provisions of the above sections, having settled the *mouzas* Kurhhia and Jynuggur, upon the defendant Girdhur Narain and that of Chicheree on the defendant Bhagwut Narain, with the concurrence of the Board of Revenue, issued an order for possession in their favour. Under these circumstances the defendants maintained that the claim of the plaintiff to the *nankar* in question could not hold good.

On the 19th of November 1824, the Second Judge of the Patna Court of Appeal gave it as his opinion, that as, from the evidence adduced, it was clear that the *mouzas* sued for had been the *nankar* of the plaintiffs' ancestors and of the plaintiff before the Company's accession to the Dewanny and had been held without interruption, rent free, and without interference from the ruling authorities, the resumption of it was palpably contrary to the provisions of section 2, regulation 19, 1793; and he considered the objections of the Collector to the claim urged by the plaintiff to be wholly unworthy of attention; on the grounds, therefore, that the *nankar* had been conferred before the accession of the Company to the Dewanny, that it had been held by the grantee and

his heirs, without the interference of any one; that it had not been proved to have been not hereditary, and that the *nankar* had been paid according to the order of the Governor General in Council and Board of Revenue, he decreed that the plaintiff should be restored to the *nankar* of the said *mouzas* to hold them as rent free, and that the Government should defray all costs of suit.

Raja Girdhur Narain, and, on the death of Bhagwut Narain, Hurbun Narain, and Odwunt Narain, his sons, appealed to the Court of Sudder Dewanny Adawlut. The respondent appeared to answer the appeal; but the Collector declined having any connexion with the further proceedings. On the 25th of November 1826, the case came to hearing before the Second Judge (C. Smith), whose judgment was to the following effect. "Although the Collector has declined having any thing to do with the appeal on the part of Government, it is evident that that circumstance ought not to prejudice the rights of the other appellants. The original *sunnud* alledged to have been executed in the year 1101 F. S., is not forthcoming, and, on the other documents exhibited by the respondent there is not much reliance to be placed. These profess to be dated before the year 1203, that is before the resumption of the estate of the Nuwab Moozaffer Jung. This much is evident from the existing documents, that the claim of the respondent, as founded on regulation 19, 1793, is futile; for that regulation has no reference to *nankar* villages.

But if by section 38, regulation 8, 1793, they were indeed exempt from assessment, these *mouzas* cannot be considered as any thing but *nankar* and *malikana*, and are by section 37, regulation 8, liable to resumption like the other *nankar* villages of the same zemindaree, which were resumed and subjected to the payment of Government Revenue; and a settlement of them should have been made with the proprietors. It is clear that the appellants are proprietors of the *mouzas* and that the respondent has no proprietary right in them. It also appears, that neither the respondent nor his ancestors have been in possession of the *mouzas* from time immemorial. On the contrary they were out of possession of them for many years after the attachment of the Jageer."

Under these circumstances the Second Judge recorded his opinion that a decree should be passed reversing that of the Court of Patna and the costs of both Courts be charged to the respondents; and that Girdhur Narain should be put in possession of *mouza* Kurkhia and Hurbun Narain and Odwunt Narain, sons of Bhagwut Narain, deceased, of *mouza* Chicheree boozorg, according to the settlement which was made with them as zemindars in 1816, and approved by the Board in 1817, and that the respondent, who it appeared had been put in possession by order of the Court below, should account for meane profits, leaving the appellants to pay the revenue of Government which had been due in the interval.

The case next came to a hearing before the Third Judge (C. T. Sealy), on the 19th December 1826, who gave it as his opinion that the evidence adduced by the respondent had satisfactorily established his claim and that the decree of the Second Judge of the Court of Patna was just and proper and should be affirmed.

1827. The whole of the papers in the case together with the opinions of the Second and Third Judges were next made over to the Fifth Judge A. Ross, whose opinion was to the following effect. "It appears that the grant of the mouzas Chicheree boozorg and v. Raja Kurhhia, the villages sued for, was issued before the 12th of Chutur Singh August 1765, in the name of Raja Nurinder Singh, and that it contained the words "*mai furzundan*" "including descendants" and likewise that the said Raja had possession previous to that date; that afterwards the said villages having been included in the Jageer of the Nuwab Moozaffer Jung, he collected the rents of them himself and paid the grantee the sum of 2,500 Rs. annually; and that the said sum was received after the death of Nurinder Singh; first, by Pertab Singh, and, after his death by Madhoo Singh, the nephews of Nurinder Singh, from the said Jageerdar till the time of the resumption of his Jageer. At the resumption of the Jageer, by order of the Governor General in Council, dated 10th July 1795, the mouzas were delivered back to the possession of Madhoo Singh; and Madhoo Singh, and, after his death, Chutur Singh, his son, the respondent, were in possession until the year 1815, when, by order of the Board of Commissioners, for Behar and Benares, dated the 14th of November 1815, the mouzas were resumed by Government and a settlement of them was made with Raja Girdhur Narain and Bhagwut Narain formerly zemindars of the said villages, which settlement was afterwards confirmed by the Governor General in Council. By sections 37 and 38, regulation 8, 1793, the villages sued for, do not appear liable to resumption. Those sections apply to lands which had been given instead of *malikana* to the proprietor of the estate, in which the said lands are situated and not to lands held rent free, by a person who has not the proprietary right in the zemindaree, in which such lands are situated, and it is not pretended that the respondent has such proprietary right or that it was not with the appellants ancestors. The grant to Nurinder Singh, was, though rent free, not *nankar*, which would be in lieu of *malikana*, to the proprietor of the estate. It remains to be determined whether, in spite of the order for giving up possession issued by Government, in 1795, after the resumption of the Jageer of Nuwab Moozaffer Jung, the resumption of the villages by the Board of Revenue was legal or otherwise. In the opinion of the Fifth Judge, the Board were not competent to resume under such circumstances—and it only remained, in his judgment, necessary to enquire into the extent of the interest, to which the respondent was legally entitled and whether it should be held to be of an unqualified or limited nature. But as, previously to the order for delivering possession of the mouza to Madhoo Singh, it had been publicly notified to the zemindars that they should be restored to the management of their lands, upon their agreeing to the assessment which had been or might be required of them, it must be held to have been the intention of Government to confer on Madhoo Singh, that only which the Government had a right to confer, namely, the rent deriveable from the lands, not any thing else to which the Government had relinquished all claim. In aid of this view of the case, the fifth

Judge cited the provisions of section 17, regulation 7, 1822, by which the Collectors are authorized to conclude a settlement of *Lakhiraj* lands, with the proprietor on behalf of the *Lakhirajdar* Raja Chutur Singh and to grant to each of the said proprietors Pottahs, defining the and other conditions on which they are to hold their land subordinate to Raja Chutur Singh the *Lakhirajdar*. Under these circumstances the fifth Judge thought that a decree should be passed to the following purport : that with respect to the possession of the villages sued for, a decree should be passed in favour of the appellants, and, with regard to the receipt of the rents due to the Government, in favour of the respondent; and that the appellants, in conformity to the order of the Collector, should be placed in possession and should pay the Government dues which had been granted to Raja Chutur Singh (the respondent), to him, and that the costs of suit should be paid by the parties respectively." The case came to a final hearing before the Chief and Fourth Judges W. Lester and W. Doriz, who concurred in opinion with the Third Judge as to the propriety of affirming the judgment of the Court below. Their judgment was delivered in the following terms.

" It is true that the fact of Government having relinquished their own appeal against the decree of the lower Court, which adjudges possession of the *mowzas* in question, to the claimants as being *Lakhiraj*, and not liable to resumption by Government, should not be allowed to prejudice the party claiming as zemindars, supporting their case to be otherwise a maintainable one.

But though the Government have withdrawn their claim to revenue from these lands, and therefore we have not immediately to decide on that point; yet the claim to resume would not have been tenable, in our opinion, inasmuch as we have no doubt of the fact of the grant having been made previously to the Dewanny by the chief authority of the day; nor do we doubt from the terms in which the original grant was made, and was confirmed, that it was meant to be otherwise than a grant descendible to heirs. The grant, with the term *nankar*, and the confirmation, with the term *nankar Lakhiraj*, generally, for approved conduct of the grantee, who is alluded to, as a sunder zemindar of the *sircar* or district, with special provision for descendants succeeding to it, does away all doubt as to its having been more than a temporary grant. Under this view, we of course consider the resumption by the revenue authorities in 1815, as "wrong"; and their settlement of the two *mowzas* with the defendants, as zemindars, in the usual course of *Lakhiraj* lands, open to this objection, namely, that these zemindars, assuming them to be such, never before had possession in the Company's time, and, but for this error of the revenue authorities, would not have had it to this day. They were deprived of possession, if entitled to it, by an act of the ruling power of the day; who chose to give these villages into the hands of the ancestor of the plaintiff, as rent free, to him and his descendants.

As to the theory of *Lakhiraj* tenures, it certainly might be urged that the holder, *stricto jure*, holds only the Government proportion of rent; and most probably, where a *Lakhiraj* tenure is granted in the present day, this might be the manner and form

1827.

Raja Gir-dhur Narain and others, v. Raja Chitr Singh. of it. But the fact as to the great majority of *lakhiraj* tenures, especially those which date from before the Company's time, appears to be otherwise; namely, that the Government share of revenue has never been defined or settled at all by the Government, but the *lakhirajdars* have been left to make their own settlements, and collect their own dues, the lands generally having been made over to their possession. And it must be observed that the objections taken in this case in appeal, are in substance, that, in point of fact, there is no legal *lakhiraj* right or tenure at all with the claimants; who urge, in reply, that the appellants have, under the circumstances, no right at all to possession, which they never obtained till very lately under a settlement concluded with them through error. Neither party therefore takes any middle course, and viewing the resumption as erroneous, we do not deem ourselves at liberty to adjudge possession to remain with the defendants, in consequence of the chance which gave it them, they paying to the plaintiffs the sum now fixed as revenue on the part of Government, and retaining the surplus profits; because, by the usual course of such grants, we do not find the interests of *lakhirajdars* to be thus limited; and, from the year 1203, when the Jageer of Moozaffer Jung ceased, the *mouzas* in question, were held by the *lakhirajdar* without any restriction, or interference, till the year 1815, (1222 F. S.) when the erroneous resumption took place, by virtue of an order of Government granted on his application; and though, during the period of the Jageer from 1175 to 1203, he, seems to have received a money payment (2,500, *per annum*), in lieu, yet it is not apparent whether this was not by his own assent; and the *perwanna* of the superintendent of the office of rent free *sunnuds*, dated 1193, shews that the right to the *mouzas* was then still maintained, and that they were registered as *inaḍm lakhiraj*. From the year 1161, (when the grant first took effect) to 1175, the *lakhirajdar* apparently held the lands, by order from the ruling power, without the interference of any third party; and when the possession was restored by Government, after the Jageer ceased, it was restored to Madhoo Singh, the descendant of the grantee, on the same terms as formerly, viz. without restriction or interference, and notwithstanding two applications on the part of the defendants to have a settlement as *zemindars*.

Under these circumstances we can only place things as they were before the resumption of 1815; and we therefore join the Third Judge in affirming the decree of the Court below."

MR. D'SOUZA
against
LIEUT. WROUGHTON.

1827.

Feb. 23d.

THIS case was originally decided by the Register of Zillah Gorukhpore, on the 3d of October 1825, but a doubt having been entertained as to the correctness of his proceeding, a reference was made by him through the Judge to the Court of Sudder Dewanny Adawlut, in the following terms.

"Mr. D'Souza brought a suit against Lieut. Wroughton for 40 Rs. the price of some goods purchased by the latter, and obtained a decree, on the 3d of October 1825—at that time no copy of the new mutiny act had been received in this Court—and the regulation of November 1825, enacted to meet its provisions, was not in existence. But the act must have been some time in force, since the commanding officer at this station received his copy, in May 1824. As by the provisions of this act, (section 57). Lieut. Wroughton, as an officer of the army, appears to be amenable to the jurisdiction of the Court of Requests, in all actions for debt in which the amount in dispute may not exceed 400 Rs. and to no other, the decree of this Court seems to me to be invalid.—Yet it can scarcely be said to be illegal, since it was passed previously to the enactment of the corresponding regulation of this Government, by which alone we are bound in our official capacity. Under these circumstances, I request, that you will have the goodness to procure for me from the Sudder Dewanny Adawlut, either permission to review my judgment, or such other instructions as the Court may think fit to favour me with."

Held that the provisions of an Act of Parliament come into operation from the date only on which the regulation having reference to it is promulgated.

To this reference the Court replied that regulation 20, 1825, which has reference to the Act of Parliament passed in the fourth year of the reign of His present Majesty King George the Fourth, not having been promulgated until after the date on which the Register had passed his decree in the above cause, he must be held to have been competent to exercise jurisdiction therein, and consequently that such prior decree must be considered, to all intents and purposes, as good and valid as if the regulation of posterior date and the Act of Parliament, which it promulgated had never been passed. It appeared therefore to the Court to be unnecessary to authorize a review or to issue any special instructions relative to the case in question.

1827.

Feb. 27th.

• DEODUTT RAI and others, Appellants,
versus
OODWUNT RAI and others, Respondents.

A claim preferred by any other than the original mukurreedar or his assignees to share in the benefit of mokurrercee tenures granted by Mr. Law in zillah Behar, held to be inadmissible; cosharer-ship in the milkeent originally not conferring title.

THIS case was originally instituted in the Zillah Court of Behar, by Oodye Kurn Rai, the father of Nurput Rai, and the other respondents, against Lala Rai, father of the appellants and others, for possession of an eight anna share of a *mokurreree mouza*, named Lodepore Bhudsema pergunna Sumai. The annual produce was estimated at 505 Rs. The plaint was to the following purport. "A *mokurreree* lease of the *mouza* was granted by the Collector, in the year 1196 F. S. in the name of Hur Narain Rai, by the advice and concurrence of his brothers Dad Mungul Rai, Kirpa and Dola, ancestors of the plaintiffs, for an *annual jumma* of 125 Rs. Hur Narain Rai made our ancestors coparceners in the proportion of an $\frac{8}{20}$ ana share and the remaining $\frac{7}{20}$ share was held jointly by the said Hur Narain Rai and Dyal Rai. Our ancestors and ourselves have been possessed of the said share from that time till the present and during the life time of the said Hur Narain used to pay the revenue through him and since his death through Lala Rai and the other defendants his sons and heirs. The said Hur Narain Rai, in order to prevent disputes executed a deed of partnership, on the 2d of *Phalgoon* 1206 F. S., with the specification of the proportions of the rent which each was to pay, and on his death Lala Rai and the other defendants, in *Cheyt* 1211 F. S., conformably with the one executed by their father, executed a second deed, which at present is in our possession. The defendants although they obtained from us the amount of fees for registering our names as proprietors, caused their own only to be entered.

Choa Rai, Torul Rai, Gopal Rai, Tota Rai and Oomed Rai, defendants, in their defence, denied the execution of the two deeds alluded to in the plaint alledging them to be forged, and stating that, in the year 1196 F. S., Hur Narain Rai, their ancestor, obtained from Mr. Law the *mokurreree* lease of the *mouza* without any one participating in the same, and that he made Dyal Rai alone a partner in the proportion of a four anna share from the time of receiving the said *mokurreree* and continued sole proprietor of the remaining twelve anna share as long as he lived; that after his death, they, the defendants, obtained an order from the Collector, in the year 1214 F. S., for possession, in virtue of which they are in possession and punctually pay the revenue due from the *mouza*, and that the ancestors of the plaintiffs and the plaintiffs were merely cultivators and never had any proprietary right.

On the death of Lala Rai, one of the defendants, Deodutt Rai and Birja Rai, his sons, put in a separate defence, similar to the one above stated, and after the death of Oodye Kurn Rai, one of the plaintiffs, his sons carried on the suit.

The Officiating Judge of the Zillah recorded his opinion against the claim observing that it rested upon the authenticity of the deeds of partnership, one dated in *Bhadoon* 1206 F. S., the other in *Cheyt* 1211 F. S., and that upon an attentive consideration

of them, they did not seem worthy of credit, it appearing from the plaintiff's statement that their ancestors and themselves had been in possession of the share sued for without interruption from 1196 till 1220 F. S., and that no deed was executed in the year 1196 F. S., at the time of the *mokurrere* grant in the name of Hur Narain Rai to them. Why, therefore, after their having been in possession for so many years, should Hur Narain Rai execute a deed of copartnership, in 1206 F. S.? and if the deed executed by Hur Narain was in existence, what necessity was there for Lala Rai, his son, to execute another? In the first deed erasures are perceptible in two or three places and in those places the ink plainly appears to be fresher than in the rest of the deed. The seal of the *Cazee* is not attached, nor is this circumstance accounted for either in the plaint or rejoinder, and although Bhoop Rai, one of the plaintiffs, on being interrogated in Court with respect to the seal not being affixed, alledged in answer that it was on account of the great fee demanded by the *Cazee*, there is no reliance to be placed on this assertion, as it is not probable that the *Cazee* would first write out the deed and afterwards refuse to affix his seal. Besides, the signature of Hur Narain to the said document does not correspond with his signatures to the receipts exhibited by the plaintiffs. Under these circumstances no reliance is to be placed upon the validity of the first deed of partnership and as the first deed is presumed to be forged no reliance can be placed on the second. Under these circumstances the case was dismissed and the costs charged to the plaintiffs.

The plaintiffs not being satisfied with this decision appealed to the Provincial Court of Patna. The Third Judge of that Court, coinciding in the opinion recorded by the First Judge, on the 14th of March 1822, and considering the circumstances contained in the deed of partnership and the possession of the share sued for, by the ancestors of the plaintiffs and themselves to be proved, reversed the order of the Zillah Court and ordered that the names of the appellants should be entered in the Collector's books for the share sued for, that they should be put in possession of the same, and that the costs should be charged to the respondents.

The present appellants not being satisfied with this decree, filed a petition for the admission of a special appeal in the Court of Sudder Dewanny Adawlut and Mr. C. Smith (Second Judge), recorded his opinion that the case ought to be further investigated on the ground, that the presumption as to the forgery of the deeds of partnership exhibited by the plaintiffs, alluded to in the decision of the Zillah Court, was not satisfactorily refuted in the Court of Appeal, and that the name of none of the plaintiffs had been entered in the Collector's office under the alledged deed of partnership. Under these circumstances the appeal was admitted on the 31st of January 1824.

The case was subsequently brought before the Chief and Fourth Judges (W. Dorin and W. Leycester), who, on the 27th of February 1827, recorded their judgment to the following effect. "The claim depending on the proof of the deeds of partnership we think them not sufficiently proved and that the oral evidence of itself is

1827.

Desdutt
Rai and
others, v.
Goddwani
Rai and
others.

1827.
Deodutt Rai and others, v. Oodwunt Rai and others. not to be relied on sufficiently. The mousas contained in the five pergunnas for which mokurrerees Pottahs were granted by Mr. Law no one (according to the doctrine contained in precedents of this Court) can claim but the mokurrereedars or grantees and his assignees. A claim founded on cosharership in milkeets originally will not hold good."

Under these circumstances, a final decree was passed reversing that of the Court of Appeal and affirming that of the Zillah Court. The costs of all three Courts were made payable by the respondents.

1827.
RADHANATH CHATOORJEA, Appellant,
versus
March 6th. NEEL KOMUL PAUL CHOWDREE and others, Respondents.

In a claim to hold certain lands as rent free, a sunnud of the zemindar was produced dated in 1196 B. S. purporting to be a renewed one in consequence of the destruction of the former title deeds; but there being no other proof of the claim it was held to be inadmissible and dismissed accordingly.

THIS action was instituted in the Zillah Court of Nuddea, on the 3d of September 1812, by Ram Komar Chatoorjea, father of the appellant, against Bykaunth Nath Paul Chowdree and Casheenat Paul Chowdree, the former defendants, to obtain possession of 101 beegahs of lakhiraj birmootur land, situated in the mouza of Salburia, in pergunna Tajpore. The suit was laid at 550 Rs. the decennial produce of the same. The plaint set forth, that the birmootur lands now claimed were the ancestral property of the plaintiff, and had been in his possession for a long time, and that in consequence of the former title deeds having been burnt, the father of the plaintiff procured a new sunnud, dated the 28th of Cheyt 1196 B. S., from Maharaja Ishur Chunder Rai under his signature. The plaintiff registered the quantity of land now claimed, in the Collector's office, in the year 1202 B. S., in conformity to the sunnud and has always had possession of the property, the zemindar making no opposition thereto; but the defendants having purchased the said mouza from the Maharaja at a private sale, dispossessed the plaintiff of the property and claimed it as their own. The delay in preferring the suit, the plaintiff stated, arose in consequence of his having been abroad for some time.

The defendants averred in reply that in 1210 B. S. they purchased the proprietary right of the mouza in question, agreeably to the lotbundee papers in the Collector's office, and that there was no birmootur land in the mouza; that the allegation of the plaintiff relative to his having been in possession of a former sunnud was false, and that if, according to his own statement, he had been in possession of the lands for a long time, he would unquestionably have caused them to be registered in the Collector's office, specifying their extent in the year 1194 B. S.; that since an order had been passed by Government that no zemindar should grant rent free tenures to any person, several grants of the above description had been produced; under such circumstances it could not be wondered at, if the father of the plaintiff, in the year 1196 B. S., fraudulently obtained a grant of this kind under an impression that no enquiry was to be made at the Collector's

office, at the time of registry, which was not attempted until the year 1202 B. S.; that neither the father of the plaintiff nor the plaintiff himself ever had possession of the land claimed, and that Radhanath, the ryots who cultivated paid their rents to the *gomashas* or agent ^{Chatcorjea,} _{v. Neel} of the estate from the time of the former zemindar, and lastly, that ^{Komal} the claim was inadmissible according to the provisions of clause 1, ^{Paul Chow-} _{dree and} section 3, regulation 19, 1793.

This cause came to a hearing on the 8th of September 1814, before the Assistant Zillah Judge, who observed in passing judgment that a renewed sunnud was not admissible, agreeably to the 19th regulation of 1793, and although the plaintiff had said, that he registered a statement of the lands in question, in the year 1202 B. S. yet, when the papers were demanded, he could not produce them, nor afford any trace by which they might be discovered; and that, therefore, the plaintiff's claim was wholly untenable. He accordingly passed a decree in favour of the defendants, dismissing the plaintiff's suit with costs.

An appeal was preferred from this decision to the Provincial Court of Calcutta, and the claim was laid at 909 Rs. being eighteen times the annual produce of the land claimed. The decision of the Court below was affirmed, however, by the Third and Officiating Judges, who observed, that although the appellant had produced a grant, purporting to be a renewed one for the land claimed signed by Maharaja Ishur Chunder Rai, yet he was unable to file a copy of the statement of the said lands from the Collector's office; that regulation 19, 1793, required all holders of rent free lands to register the particulars of the same in the Collector's office, and that although the plaintiff had pleaded that he registered the particulars of the land in question, in the year 1202 B. S. in the Collector's office, yet that he could not produce the date, or number of such registry; that without ascertaining one of these points it was impossible to find the particulars in the Collector's office; and that without the production of the papers, containing a statement of the lands now claimed, judgment could not be passed in favour of the claim.

The appellants subsequently petitioned the Court of Appeal to review their judgment on the ground that they had searched the Collector's office, for a record of their claim and that they had traced it; but that the leaf containing it had been surreptitiously abstracted by the *mohafiz duster* who had been removed from his situation in consequence. In corroboration of this assertion they produced a report by the Collector; but the petition for review was rejected by the Third Judge. At this stage of the proceedings the plaintiff died, and his son Radhanath Chatcorjea, the present appellant, being dissatisfied with this decision, presented a petition for a special appeal to the Court of Sudder Dewanny Adawlut, which was admitted on the grounds contained in the Court's proceeding, dated the 17th of May, namely, a letter written by the Collector to the Board of Revenue in which he stated, that the record keepers of his office, could not find the statement of the land in question, in consequence of a leaf being torn out of the registry books, and the refusal of the Provincial Court to admit a review of judgment, notwithstanding they were aware of the irreg-

1827. **Radhanath, Chatoorjea v. Neel Komul, Paul Chowdree and others.** gularity which had occurred in the Collector's office. At this stage of the proceeding Bykaunth Nath Pal Chowdree, having died, his son Neel Komul Pal Chowdree, and at the death of Kashe-nath Pal Chowdree, his son Bungseedhur Pal Chowdree, on his own behalf, and Gunga Narain Pande and Chunder Munee Dasee, as the guardians of Isher Chunder Pal Chowdree, and Jy-chunder Pal Chowdree, the minor sons of Kashenath, deceased, became the respondents. The Court of Sudder Dewanny Adawlut (W. Leycester and W. Dorin Chief and Fourth Judges,) after a careful perusal of all the papers connected with the cause, were of opinion, as follows. "The land now claimed cannot be admitted to be a *lakhiraj* tenure, agreeably to the regulations; the presumption being that, if ever there was any *sunnud*, it was the *sunnud* of 1196, and no other. For fifteen years before that period the plaintiff, though he alledged a grant of 1,172, admits the lands were deserted and had become not traceable. There can be no doubt that the lands, if ever granted, could not be legally *lakhiraj*. If Government resumed beyond 101 beegahs, granted before December 1790, (*Aghun* 1197), the grantee would still be "*malik malgozar*." But in this case the adverse party alledges, that, though a grant may have been, fraudulently obtained, yet there never was any real posession. There is no evidence to possession within twelve years of the suit, and, allowing the fact of a registry in the Collector's office, it is by no means decisive that there was possession at the time. The father of the plaintiff was *mootusuddee* in the Collector's office and not resident in the *mouza*. There is no proof that the adverse party ousted the plaintiff on their purchase of the *talook* in 1213. B. S."

A decree was therefore finally passed for the above reasons, affirming the decisions of the Courts below and dismissing the appeal with costs.

**MOOHUMMUD ALI KHAN, CHEDOO KHAN and
MOOHUMMUD NOOR KHAN,** Appellants,
versus

**MOOHUMMUD ASHRUF KHAN and MUSSUMMAUT
BUSREE,** Respondents.

1897.
April 30th.

THE respondents instituted this suit on the 29th of May 1820, in the Bareilly Court of Appeal, to recover possession of twenty-one out of sixty-four portions of two *lakhraij mouzas*, named Dhunkolee and Dhugla, and of a house and two gardens in Dulsingar, all within the pergunna of Pillibheet. The suit was laid at 9,975 Rs. exclusive of mesne profits, for which the plaintiffs stated it to be their intention to sue separately. The plaint set forth that the plaintiffs were the son and daughter of one Imamodeen, the deceased proprietor of the above mentioned estate. At his death, which occurred on the 13th of August 1802, he left two sons, namely, Moohummud Hoosein and Moohummud Ashruf, and four daughters, namely, Kheirun, Busree, Busheerun and Huleema, and a widow named Mussummaut Begum. Hoosein, who is since dead and who was the father of the defendants, being grown up at the time their father died, took upon himself the management of the entire property, the plaintiff Ashruf being then a minor and only nine years of age. The names of Hoosein and Ashruf were registered as joint proprietors in the Collector's books. In the year 1813, suspecting fraud on the part of Hoosein, the plaintiffs together with Begum and Busheerun sued for their shares. The other daughters, Kheirun and Huleema, sided with Hoosein, who did not deny the justice of the plaintiffs' claim and the matter was referred to the arbitration of Mullik Moohummud Ali and Moohummud Baree. These arbitrators decided that one-half of the property belonged of right to the plaintiffs and the other half to the defendants and their heirs, namely, Dhunkolee to the plaintiffs and Dhugla to Hoosein, Kheirun and Huleema. The award further provided that, in the event of any dispute subsequently occurring, a distribution should be had recourse to agreeably to the law of inheritance. The written assent of the parties was obtained to the award and Dhunkolee accordingly came into the possession of the plaintiffs and was held by them until the year 1225 F. S.; but in the year 1226, Hubeeb and Noor sons of Kheirun and Muddoo and Ajoo, sons of Hoosein, created a disturbance and seized the produce of the lands. Ashruf brought a summary action against them for the value of the produce seized, but he was referred to a regular suit. As the defendants had departed from the award, and had, in the year 1227, ousted the plaintiffs altogether, it was but equitable that a decree should be passed agreeably to the law of inheritance; and, agreeably to this law, the property should be made into sixty-four parts; of which forty-three should be given to the defendants and twenty-one to the plaintiffs. Nusrut, though not a member of the family in this case, was made a defendant by reason of his aiding and abetting the others in keeping the plaintiffs out of possession.

The heirs
being a
widow, a.
son, four
daughters
and three
sons of a
deceased
son, the
property
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ing to the
Moohum-
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law of in-
heritance
be made
into 192
shares, of
which the
widow will
take 24, the
son 42,
each of the
daughters
21, and
each of the
grandsons
14.

1827.

Moohum-
mud Ali
Khan and
others v.
Moohum-
mud Ash-
ruf Khan
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The defendants in reply asserted that they had adhered to the conditions of the award which did not contain any provision, as falsely alleged by the plaintiffs, for having recourse to the law of inheritance; that the *mouza* of Dhugla fell to the share of their father, on whose death they succeeded to it; that they had never molested the plaintiffs, and that, as to the house and gardens claimed, they were personally acquired by themselves, the plaintiffs having no right or title to share therein. Nusrut disclaimed all participation in the dispute. There were other defendants, namely, Busheerun, Kheirun, and Khuleel Noor and Hubeeb, and the sons of Hoosain; but their answers were to the same effect as the foregoing and they did not take any part in the subsequent proceedings. Various witnesses were brought forward by the parties and the most important documents adduced were the awards of arbitration, each party producing a different one. In that brought forward by the plaintiffs, mention was made of the propriety of having recourse to the law of inheritance, in the event of any dispute occurring; while, in that produced as the genuine award by the defendants, such a provision was entirely omitted and the adjustment therein made was pronounced final and absolute. The Senior Judge of the Bareilly Court, after having heard all the evidence and perused all the exhibits filed by the parties, propounded the following question to his Moohummudan law officer. A Moosulmaun dies leaving two sons, four daughters and a widow—one of the sons has died since leaving three sons him surviving. Under these circumstances, in what manner should the estate of the original proprietor be distributed among the survivors? The answer was that the property should be made into one hundred and ninety-two shares, of which twenty-four should go to the widow, forty-two to the son, twenty-one to each of the daughters, and fourteen to each of the four sons. On the 23d of April 1821, the Senior Judge of the Court recorded his opinion to the following effect: The defendants have been unable to produce any evidence to show that the house and gardens claimed are their exclusive property, and therefore the entire property seems fairly divisible among the parties. The plaintiffs are clearly entitled to sixty-three out of one hundred and ninety-two portions. That proportion is therefore awarded to them. The defendants may take the rest and should pay all costs of suit.

An appeal was preferred against this decision to the Court of Sudder Dewanny Adawlut. The principal grounds on which it rested were the fact that the decree of the Provincial Court was in direct opposition to the award of the arbitrators. The respondents on the other hand maintained that the alleged award was contrary to the *Furaiz* or law of inheritance, which circumstance was itself a proof of partiality and such as to render it null and void. The case came first to a hearing before Mr. J. Ahmuty, Officiating Judge of the Court, who ordered further evidence to be taken by the Court below.

A number of witnesses were examined and their depositions submitted for the consideration of the superior Court. On the 19th of April 1827, the Chief and Fourth Judges, of the Sudder Dewanny Adawlut (W. Leycester and W. Dorin), after much consideration determined that the decree of the Court below should be left un-

touched, because the award of the arbitrators was not fit to be upheld, it being unequal and partial on the face of it; because it was not carried into effect except by giving one mouza into temporary possession of one party and the other mouza to the other party, whereas a division of half and half was ordered; and because it was not calculated to end disputes and did not do so, for it contained a clause that either party being dissatisfied might have recourse to the law of inheritance. As to the award produced by the appellants, the Court deemed it to be entirely spurious, the true one being that brought forward by the respondents as desposed to by Mullik Moohummud, one of the arbitrators. The disposition ordered to be made by the Provincial Court, was, for the above reasons, declared to be in every respect correct and proper and the decree was affirmed accordingly. It may here be mentioned that Nusrut, one of the original defendants put in his claim to share as a son of Imamoodeen, but his allegation as to his being the son of that individual was considered disproved by the Court, as well by reason of the presumption arising from the non-mention of him as such at the time of the award, as from the positive testimony of two witnesses connected with the parties who negatived the assertion.

Moohummud Ali Khan and others, v. Moohummud Ashraf Khan and another.

ANUND MYE BISWAS, Appellant,

1827.

versus

The COLLECTOR of the Zillah 24 Pergunnas, Respondent.

May 14th.

THIS case involved a claim to an annual reduction of Rs. 561. 4. in the whole sudder jumma of the Pultah estate in perganna Calcutta, and for a refund of Rs. 3,928. 12. on account of rent received by Government from 1216 to 1222 B. S. inclusive, at the above yearly rate. The suit was instituted by the appellant in the Calcutta Provincial Court against the respondent, on the 18th of March 1817.

The plaint set forth that the plaintiff purchased the Pultah estate with all the rights of the former proprietor at the Company's public sale, on the 12th of Aszin 1216 B. S. for Rs. 5,605; but, on taking possession, discovered that, of the 1,417 beegahs, 81 biswas of land specified in the register of the estate, 249 beegahs, 8 biswas 14 chittaks occupied by gardens and factory, were exclusively in the possession of Government, who neither paid the rent themselves nor deducted it from the amount of revenue fixed on the estate; that a refund of Rs. 4,200, had on a former occasion been conceded by an order of the Governor General in Council, dated 8th February 1811, on the reports of the Board of Revenue, to the recent proprietors Messrs. Fairlie, Ferguson and Co., in consideration of their not having enjoyed possession of these lands; that, in consequence of this, the plaintiff had repeatedly

1827. submitted petitions to the Collector and Board of Revenue, for a reduction of the rent, accompanied by copies of the reports made by the Collector, dated the 28th and 30th of November and 2d of December 1811, and the orders issued by the Board of Revenue, on the 3d and 30th of November and 5th of March 1810, but no attention had been paid to them; and that being and having been every year, subjected to great difficulty and loss in discharging the Government Revenue in consequence of non-possession of the above lands and no deduction of their rent being allowed, he now sued by order of the Board of Revenue, for a reduction of Rs. 561. 4. being the annual rent of 249 *beegahs*, 8 *biswas* 14 *chittaks* of land as ascertained by the measure generally used on the estate and for a refund of the surplus revenue received by Government.

The Collector put in a reply to the following purport.

The Pultah estate, on the issuing of the usual notification for a public sale, to realize the arrears due to Government, was purchased on the 26th of September 1809, in the plaintiff's name, by his father Prankishen Biswas and the revenue assessed on it duly discharged every subsequent year in several payments. He never complained of any deficiency in the quantity of land. On the contrary six months after the purchase he presented a petition to the Collector, stating that he had obtained possession of the lands and was satisfied with his bargain and requesting the union of the estate with certain other *talooks*, his property, under section 6, regulation 25 of 1793; nor did the plaintiff or his father prefer any complaint on the subject within one year from the time of purchase, the period prescribed by the regulations. The above estate is an undivided *mehal* and not of the nature of those lands into which by section 29, regulation 7 of 1799, the Collector is bound to make an investigation. When the notification for a public sale was issued, the plaintiff ought to have made himself acquainted with all the particulars before he purchased, but after a sale has been concluded the purchaser is entitled to all profits and liable to all losses that may ensue. The regulations distinctly declare that the purchaser of lands at a public sale must ascertain the particulars of the *jumma* and the extent of the property. Government do not guarantee to the purchaser any thing beyond the right of the former possessor in the land sold. The former tenant was, for many years, in possession of the lands purchased by the plaintiff at the public sale. He never was in possession of any additional land nor after the estate was sold and the plaintiff had been seized of it, were any lands appropriated by Government for factories or other purposes. The present claim is therefore quite groundless. In the matter of Fairlie, Fergusson and Co. Government never ordered or authorized any reduction in the *jumma* of the Pultah estate.

On the 5th of February 1823, the Senior Judge of the Provincial Court passed judgment in this case, to the following effect. "At the time of the public sale, the former proprietor was in possession of exactly the same quantity of land as the plaintiff now holds and, accordingly had duly paid the whole revenue fixed on the estate. The plaintiff, therefore, who after the notification of a public sale, knowingly and deliberately purchased the property as enjoyed by

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the former possessor, could in no possible way be entitled to rent for lands which were never in the possession of the former proprietor and consequently his claim to the reduction of rent was quite untenable. Under clause 2, section 29, regulation 7, 1799, the plaintiff ought to have preferred his claim to the Collector or the Board of Revenue within one year. He had failed to adopt this line of conduct and had moreover presented a petition to the Collector, stating that he was satisfied with the lands and jumma, and requesting that the estate might be incorporated with certain other of his talooks, thereby shewing that he had no ground of complaint. No weight can be attached to what has been stated by the plaintiff in reply to the question of the Court, that the delay in preferring the claim was occasioned by his being ignorant how much ground was occupied by the Government factory and gardens, for it was incredible that the plaintiff should not have ascertained in seven years after his purchase, whether he had obtained possession of all the lands detailed in the register or not. From the English letters filed by the plaintiff it appears that Messrs. Fairlie, Fergusson and Co., the former possessors of the above estate, did not recover the amount of the revenue for the land occupied by the Government factory and gardens while in possession, but were allowed a certain sum by Government two years and some months after the sale and succession of the plaintiff, in 1811. Under these circumstances it cannot be inferred that any reduction was made from the jumma." He therefore dismissed the suit with costs.

The plaintiff appealed from this decision to the Court of Sudder Dewanny Adawlut. The pleas of appeal were the same in purport as those contained in the plaint preferred in the Court below. The respondent in answer pleaded that from the decrees passed by the Court, in the cases of Doorgapershad Bose, appellant, *versus* The Collector of the 24 Pergunnas, respondent, decided on the 18th of August 1806, and of Baboo Birjuath and others, appellants, *versus* The Collector of Burdwan, respondent, on the 29th of May 1817, it was clear that the appellants' claim to a reduction of the jumma fixed by the officers of Government was inadmissible under the regulations.

The case came to a hearing originally before the Second Judge (C. Smith), on the 27th of January 1826, when all the papers and pleadings having been read, as well as three decrees passed by this Court, in the cases of Doorgapershad Bose, appellant, *versus* The Collector of the 24 Pergunnas, respondent, decided on the 18th of August 1806, of Baboo Birjuath and others, appellants, *versus* The Collector of Burdwan, respondent, on the 29th of May 1817, and of the Collector of Bareilly, appellant, *versus* Major Hyder Beg Hearsey, respondent, on the 28th of July 1824, he recorded his judgment to the following effect.

"Clause 2, section 29, regulation 7 of 1799, does not, in the slightest degree, affect the present claim; for it refers to section 10, regulation 1 of 1793, and was enacted to regulate the sale of such entire estates as should be put up to auction in two or more lots, the jumma chargeable on each having been separately and distinctly fixed previous to such sale. In the present case the

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estate was not divided into two or more lots at the public sale, which took place, on the 26th of September 1809, but was sold entire and in the same state as when in the possession of Fairlie, Fergusson and Co., and, therefore, the circumstance of a year having elapsed before the action was brought does not bar the appellant's claim. In the next place there are certain circumstances peculiar to the present case which distinguish it from the three cases formerly decided by this Court; for, in this case, Government being convinced, on investigation, of the deficiency in the quantity of land, refunded to the former possessors the sum of Rs. 4,200, to compensate for the loss sustained in consequence, and if the former possessors were entitled to a refund of a portion of the Government Revenue, the purchaser at the public sale, who succeeded to all their rights, is likewise entitled to the same compensation. If there has been any delay in the institution of the suit in consequence of an ignorance of the state of things, no blame can be attached to the appellant. He purchased the Pultah estate for Rs. 5,775, supposing that it consisted (according to the description at the time of sale) of 1,417 *beegahs*, 11 *biswas* 2 *chittaks* of land, and one year after the public sale, in March 1811, the above refund was conceded to the former proprietors. The notification does not make the slightest mention of the deficiency in the land; how then could the real particulars of the case have been known at the time of the public sale so as to deter the purchaser from buying? No portion moreover of this deficient land appears to be in the occupation of any third party against whom the appellant might bring his action and therefore the argument urged in former cases, that the respondent should have sued the persons in possession does not apply to the present case. The appellant claims only a reduction in the amount of *jumma* and a refund of the surplus revenue already paid by him. And it appears from the letter of the Acting Secretary to the Board of Revenue, dated the 31st of December 1819, that the Board admit that if the appellant relinquishes the above estate and it should revert to Government it will be necessary to make a reduction in the *jumma*, proportionate to the deficiency of land, before it is again sold. The argument that no diminution in the amount of revenue was conceded to the former possessors is altogether futile; for their estate was transferred to another person before the deficiency in the land was established and they had consequently no inducement to exert themselves for a reduction in the future *jumma*. The appellants statement with respect to 249 *beegahs*, 8 *biswas* 14 *chittaks*, being the extent of deficiency in land has not been denied in the answer to the claim or other papers and this silence on the part of the defendant appears to imply an assent to the nature of the claim." For these reasons the Second Judge recorded his opinion that it would be proper to reverse the decision of the Calcutta Provincial Court, passed on the 5th of February 1823, and to award to the appellant for seven years from 1216 to 1222 B. S. inclusive, the sum of Rs. 1,685, (calculating at the rate of a little more than 240 Rs. *per dñnum*, or 15 *anas*, *per beegah*), and for the ten years which had elapsed since the institution of the suit, namely, from 1223 to 1232 B. S. inclusive, at the same rate,

the sum of Rs. 2,407, or in the aggregate for 17 years, the sum of Rs. 4,092, payable by Government, who should in future, from 1233 B. S., receive from him an annual revenue of Rs. 1,127; the costs of both Courts to be defrayed by the respondent.

The case was next brought before the Third Judge (C. T. Sealy), who on the 5th of February 1826, recorded his opinion in substance as follows.

"After an attentive consideration of all the papers and circumstances of the present case, I am of opinion, that it clearly comes within the provisions of clause 2, section 29, regulation 7 of 1799. By the above enactment the appellant was required to bring forward his objections on the score of any deficiency in the quantity of land within one year. As he has failed to do this and has not brought his action till after a lapse of seven years from the date of the public sale, his present claim is not within the cognizance of the Court by the provisions of the above regulation. I am, therefore, of opinion that the decree of the lower Court should be affirmed in every point."

In consequence of this difference of opinion the case was ordered to lie over for the consideration of another Judge.

The Chief and Fourth Judges (W. Leycester and W. Dorin), accordingly next took up the case and having gone through it, passed a decree, on the 14th of May 1826, in purport as follows.

"The plaintiff did not bring this action to be relieved from the bargain on the ground of any inaccuracies in the advertisement exhibited at the time of the auction nor to recover the remaining land of that specified at the time of sale, if in reality they got possession of no more than one or two hundred *beeghas* of land, or whatever it might be; but expressly for a reduction in the amount of *jumma* fixed by Government on the Pultah estate, as detailed in the plaint—admitting that section 29, regulation 7, 1799, is applicable rather to portions of estates than to distinct estates, or *mehuls*, still the spirit of it is applicable to all sales, and, as well according to that enactment as to the practice of the Court in former cases, the Judicial authorities have no power to reduce the amount of *jumma* fixed by Government. There seems therefore to be no good reason for interfering with the judgment of the Provincial Court." A decree was accordingly passed, dismissing the appeal, affirming the order of the Court below, and making all costs payable by the appellant.

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May 28th.

THE COMPANY'S AGENT for Saltpetre, Appellant,
 versus
 RAI NEELMUNEE MITTER and RAI PRANKISHEN
 MITTER, Respondent.

The *dewan* of an agent for saltpetre having executed an engagement making himself responsible for the fulfilment of their engagements by the contractors, who had received advances for the supply of that article, they having already furnished security, held that an action by the agent will lie against the *dewan* without reference to the other sureties.

THIS suit was instituted originally by the appellant, in the Patna Provincial Court, on the 20th of December 1819, against the respondents, to recover the sum of Rs. 11,428—on account of certain quantities of Saltpetre not duly delivered at the Company's saltpetre factory, at Patna.

The plaint set forth that Kaleepershad Chukurwutee, received, at different times through Ramsoonder Mitter, the *dewan* of the saltpetre factory, at Patna, the following sums in advance and gave his receipt for the same, viz. Rs. 10,000, on the 2d of February; Rs. 2,500, on the 12th of May and Rs. 9,375, on the 28th of September 1818, forming a total of Rs. 21,875, under an engagement to supply 3,500 maunds of refined saltpetre; that Ramsoonder Mitter took from him two *ikrarnamas* or acknowledgments—one for Rs. 12,500, dated the 1st of April 1818; the other for Rs. 9,375, dated the 28th of September 1818, secured on the guarantee of Munohur Bunhoojea to the Agent and himself and executed an *ikrarna* in the shape of a security bond on the 17th of October 1818, setting forth that the contractors were responsible to the agent for the repayment of the advances made to them in 1817 and 1818, according to their agreement, and that, in the event of their being unable to discharge the amount, he (Ramsoonder Mitter) would make good the deficiency from his own funds. Subsequently Kaleepershad on various occasions supplied 1,671 maunds, 19 seers of refined saltpetre to the value of Rs. 10,446, and then disappeared without liquidating the balance of the advances and Munohur Bunhoojea is dead. Under these circumstances the amount now claimed is recoverable from the above *dewan* under the *ikrarna* executed, on the 17th of October 1818. The *dewan* being dead and his sons (the defendants) having succeeded to the possession of his entire estate the present suit is now instituted against them.

The defendants in reply altogether denied the plaintiff's claim, and stated that the agent at the factory had the power of making advances and that their father Ramsoonder Mitter filled the situation and performed the duties of *dewan*, being subject to the controul of the agent, but was in no way authorized to advance money; that it was contrary to all usage to take an *ikrarna* or deed of acknowledgment for sums advanced, from the *dewan*, nor had any of the commercial agents ever taken an *ikrarna*, by way of a security bond on money lent, from the officers of their establishment; that if the plaintiff, who had persecuted their (the defendants) father in order to make him resign, had forcibly compelled him to execute the above deed, it was clearly void; that if the plaintiff really had considered such *ikrarna* to be a valid and binding instrument, there was no necessity, after it had been executed, when Munohur-Bunhoojea (the surety of Kaleepershad Chukurwutee (to whom the "advances were made) went to

Bengal, to have taken the security of his brother Ramdhan Bunhojea, which was done, as appears from the *perwannas* addressed to the above surety, on the 21st of October 1818; that besides Kaleepershad Chukurwutee to whom the advances were made was alive and residing in mouza Achouna, pargana Pundwah, zillah Hoogly, and although Munohur, his surety, was dead, yet his brother and heir Ramdhan Bunhojea was in possession of his estate and worth many thousand Rs.; that these persons ought to have been sued, and as the plaintiff had not proceeded against them, he ought to be non-suited on the present occasion, and that the agent, whose continued hostility compelled their father to retire from the situation of *dewan* and to give up the accounts of his office, would never have accepted his resignation had he considered him responsible on any account. The plaintiff in rejoinder stated that the defendants father himself received the monies advanced for the provision of saltpetre fictitiously in the names of others, executed in consequence the *ikrarnama* dated the 17th of October 1818, and, in conformity thereto, himself repaid the sum advanced to Ramjiye Mitter, a contractor; that the amount now claimed was due from the defendants under the above deed and that there was no necessity to sue Kaleepershad Chukurwutee or Ramdhaw Burhoojea. The defendants in replication reiterated their former allegations, denied that their father received the sums advanced ostensibly in the name of others, and contended that Ramjiye Mitter, a contractor for saltpetre, repaid, from his own funds and with his own hands, the money which had been advanced to him by Government for the supply of saltpetre as could be substantiated by an *ikrarnama*, executed by Ramjiye, on the 27th of February 1819, by the petition of Rai Neelmunee, one of the defendants, dated the 23d of September and the *perwannas* issued by the plaintiff, on the 28th of April and 6th of May, in the same year.

On the 20th of January 1823, the Second Judge of the Provincial Court, expressed his opinion that the plaintiff's claim would not lie against the defendants. For the authenticity of the *ikrarnama*, dated the 17th of October 1818, had in no way been established, and even if it had been, the execution of any such deed by the father of the defendants, who was one of the subordinate officers of the factory, was contrary to all rule and usage. Nor did it contain any stipulation binding the heirs of the late Ramsoonder Mitter to fulfil it; and from the circumstance of the plaintiff's having, subsequent to the date of the above *ikrarnama*, made Ramdhan Bunhojea become surety for Munohur Bunhojea (the surety of Kaleepershad Chukurwutee), there was reason to suppose that he (the plaintiff) considered the *ikrarnama* to be irregular and invalid. He accordingly dismissed the suit with costs, leaving to the plaintiff the option of proceeding against Kaleepershad and Ramdhan Bunhojea (surety of the late Munohur Bunhojea) for the amount of his present claim.

Government being dissatisfied with the foregoing decision appealed to the Sudder Dewanny Adawlat. The case came to a hearing originally before the Second Judge (C. Smith), in the presence of the *vakils* of the parties, on the 3d and 5th of June 1826, when he delivered his judgment to the following effect.

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"I am of opinion that the authenticity of the deed executed by Ramsoonder Mitter, late *dewan* of the Patna factory, on the 17th of October 1818, is established by the genuine appearance on the face of it, the evidence of Munohur Singh and the original English petition, dated the 14th of February 1819, filed with the proceedings. This deed sets forth that "certain sums of money advanced by the agent to contractors on security for the provision of refined saltpetre, in the years 1817 and 1818, shall be realized from the contractors or is default thereof the *dewan*, (the assistance of peons being previously granted to him) shall make good the deficiency from his own funds."—The expression such contractors as received advances from Government, in the years 1817 and 1818, for the provision of refined saltpetre "on security" is of essential importance in the present case, for it is clear from two *ikarnamas*, dated the 1st of April and 28th of September 1818, that Kaleepershad Chukurwytee, on giving security, received in that year from the Treasury of the Patna factory, the sum of 21,875 Rs. of the Company's money for the provision of refined saltpetre. The plaintiff after deducting from 4,000 maunds valued at Rs. 6. 4. per maund, 1,671 maunds, 19 seers, which, at the above rate, would be worth Rs. 10,446. 13. 5. has brought his action for the balance not delivered, viz. 2,328 maunds, 21 seers of saltpetre, and the defendants have, in no way, proved that they did provide more than the above quantity. Kaleepershad having left Patna and gone to his home, which was situated a great distance from thence, it was out of the power of the agent at the Patna factory to send the peons of his establishment to receive the saltpetre or the balance due according to the deed. Whether therefore he be alive or dead, the plaintiff's claim against the heirs of the late Ramsoonder Mittet is perfectly regular and correct. The plea that Munohur Bun-hoojea and Ramdhun Bunhoojea were securities is altogether irrelevant, inasmuch as it does not appear from the above document that Kaleepershad omitted to give security; on the contrary the said deed was executed in consequence of advances made by the agent during the years 1817 and 1818, to contractors on security. Besides from all the circumstances of the case and the power vested in the respondents father for the management of the affairs of the factory, there is strong reason to suspect that the contractor and his first and second surety were the creatures of the late *dewan*, who was by no means unconcerned or unacquainted with the secret history of this transaction and the embezzlement of the Company's money." Under these circumstances the Second Judge did not deem it proper to affirm the decision of the lower Court and declared his opinion that judgment should be passed for the appellant awarding to him the sum of Rs. 11,428, payable by the respondents, who should likewise bear all costs.

The case was next taken up by the Third Judge (C. T. Sealy), on the 2d of January 1827, who recorded his opinion in the following terms:

"In this case, it appears that two persons are stated to have witnessed the *ikarnama*, dated the 17th of October 1818; of whom one is dead. The other (Munohur Singh) has deposed that he attested the above deed at the request of the agent at the factory;

that Ramsoonder Mitter was present at the time, but that he (the witness) neither heard him acknowledge, or deny the execution of it. And although, in an original English petition, dated the 14th of February 1819, purporting to have been presented by Ramsoonder Mitter to the Board of Trade, (filed among the papers of this case), he states that he had, at the request of the agent and under the idea that the former servants would be continued in their situations, executed a deed making himself responsible for the good conduct of the sudder and *mofussil omla*, and though it is probable that some *ikrarnama* was executed, yet the authenticity of the document now brought forward has in no way been established, nor has the signature of Ramsoonder Mitter thereto been satisfactorily proved. It is moreover set forth in that document that if the contractors failed to supply the saltpetre according to their agreement, the agent at the factory should, according to the regulations, appoint peons to assist him (Ramsoonder) and he would be responsible for the default. The agent however had neglected to fulfil the conditions of the deed. Even supposing Ramsoonder Mitter to have executed the deed in question, I am of opinion that it only meant that if such contractors as gave security on receiving the advances, or their sureties failed to provide the saltpetre he (Ramsoonder Mitter) would be responsible for the default. But it appears that Kaleepershad is alive and that the heirs of Munohur Bunhoojea his first surety are in the possession of his estate and provided with abundant assets. Ramdhun Bunhoojea the second surety for Kaleepershad is also alive and residing in zillah Hoogly within the jurisdiction of the Calcutta Court. The saltpetre agent ought therefore to have sued the defaulter Kaleepershad, the second surety Ramdhun Bunhoojea, and the heirs of the first surety. As he has not followed this course, I am of opinion that he should be non-suited."

The case was next brought before the Chief and Fourth Judges (W. Leycester and W. Dorin), on the 14th of May 1827, who, after a careful consideration of all the circumstances of the case, passed the following decree.

The substance of the defence in this case seems to be "1st, that there was no such security bond executed by the deceased,—2ndly, that supposing any such to have been executed, it must have been taken by compulsion, for it was against all usage and propriety to take such a bond from a ministerial officer of the factory—3rdly, that at all events the suit was irregular for the principal defaulter Kaleepershad, and the heirs of the first surety Munohur, should have been first proceeded against."

First, then, as to the question of regularity.

Supposing the security bond, under date the 17th of October 1818, purporting to be from the *dewan* of the factory in favor of the Government agent for saltpetre, to have been duly executed, it sets forth that certain monies advanced for the years 1817 and 1818, to a contractor for the provision of saltpetre shall be followed by the due delivery of given quantities of saltpetre; or that the *dewan*, (certain assistance in the shape of peons, &c. being previously afforded him) will be responsible with his own funds for the default. It is stated by the plaintiff, and not disputed by the defendants,

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1827. The Company's agent for saltpetre, v. Rai Neel-munee Mitter and Rai Prankishen Mitter. that Kaleepershad was the contractor; and that default took place on his part to the extent laid in the plaint. Under these circumstances there seems no reason why the Government should not sue on this bond, if they think proper, notwithstanding there was another surety, prior in point of time, and also a surety of that surety, posterior in point of time, and notwithstanding the principal debtor has not been sued. The plaintiff states him (the principal debtor) to have absconded; and it is clear that whether he has absconded or not, he has gone to a distant part of the country and the defendants neither alledge that he has assets, nor point out any.

As to the other surety whose heirs are stated to have abundant assets, it seems optional with the Government to proceed first against which of the two sureties they please, and supposing the Government to have enforced payment from the defendants, as heirs of the alledged surety Ramsoonder, the only question would have been, how far the defendants might have had their action for proportionate contribution against the other surety for the same principal debt; besides their undoubted right of action against the principal debtor, whenever he should be forthcoming and solvent. On the question therefore as to the regularity of the suit, it seems fit to be sustained, as now brought.

Then the next and main question, as to the merits, is whether the bond is to be enforced.

But the evidence brought to its execution by Ramsoonder appears to the Court insufficient; for the one witness brought to speak to it, does not state facts from which its due execution can be gathered, especially under the suspicion raised by the circumstances of the case, that the *dewan* must have been under coercion, or undue influence. And the paper (an English petition), purporting to have been written by Ramsoonder, in May 1819, referred to in the pleas of appeal as confirming the one witness's testimony, and as being, jointly with it, sufficient for proof, does not, in the opinion of the Court, confirm it; but only leaves it under the same suspicion as before of having been taken, if taken at all, by undue influence.

And it should be remarked that when the contractor, Kaleepershad executed engagements for providing saltpetre for advances made to him, he gave Munohur as security in the usual course; and only sometime afterwards appears this alledged security bond of the *dewan*, purporting to bind him personally. And though it is alledged that the *dewan* was the real contractor in the names of others, yet this is denied by the defendants, and is not in proof.

Under the whole view of the case, the Court do not look on the evidence adduced by the plaintiff as affording sufficient proof of the due execution of the bond, by the late *dewan*, and for this reason affirm the decree of the lower Court."

T. HOO (Attorney of THOMAS HUTT, deceased);
Appellant.
versus
PETER MARQUIS, Respondent.

1827.
July 10th.

THIS suit was instituted by T. Hutt, (since deceased), in the Court of the suburbs of Calcutta, on the 16th of March 1813, against Peter Marquis, to recover possession of one *beegah*, seventeen *biswas* of land together with a tank and garden ap pertaining thereto, situated in Entally. The plaintiff was an inhabitant of Chandnee. The plaint set forth that the plaintiff's father (T. Hutt, senior), was in the pilot service; that he purchased fourteen *biswas* of the land in question, from Sookhdeb Ghose and one *beegah*, three *biswas* from Panchoo Das, together with the garden, tank and buildings thereunto appertaining; that, in the year 1783, he obtained a Pottah and continued in possession during his life time, regularly paying revenue for the same; that, besides the above property, he purchased two *biswas* ten *chittacks* of land, with a house in Nulpokhuria, within the limits of Calcutta, as well as two other pucca houses in the same neighbourhood; that he died seized of the above property in the year 1792, leaving, besides, at his death, effects and money to a considerable amount; that the plaintiff being a minor and his father having died intestate, his mother Lucy Hutt, took out letters of administration from the Supreme Court; that, on his father's death, his mother obtained a pension from Government of 20 Rs. per *mensem*, on which and the proceeds of the property left her by his father she lived and supported the plaintiff; that in 1811, the plaintiff came of age and discovered that the defendant had got possession of the Entally property, under an allegation of purchase from his mother; that in the year 1817, the defendant came to him (the plaintiff) and tried to prevail on him to execute a release, which however he refused to do and denied his right under the purchase; that finding the defendant had collusively obtained the registry of his name as proprietor in the Collector's office, he brought this action intending to sue for waste and mesne profits at a subsequent period. The suit was laid at 2,220 Rs.

Sale made by the administrator of the real estate of an intestate held to be invalid, under the English law, in the suit of the son, who was declared entitled to recover possession, on repayment of the principal of the purchase money.

The answer of the defendant was to the effect that Lucy Hutt being much in want of money for the purpose of repairing the houses left by her late husband, in the town of Calcutta, which houses were in a ruinous condition, sold the Entally property to him, for the sum of 500 Rs.; that the sale took place, on the 7th of March 1800, when the defendant immediately obtained possession; that the plaintiff's mother, by means of the purchase money, repaired the houses, in Nulpokhuria, within the city of Calcutta, and let them, supporting herself and her minor son with the rents therefrom derived; that on his application to be registered as proprietor, a proclamation issued from the Collector's office, on the 7th of July 1812, for the appearance of any counter claimants and no one appeared although the plaintiff had then attained the age of majority; that he had regularly paid the rents and that from the date of his purchase to the present plaint, a period of nearly eighteen years had elapsed.

1827.

**T. Hoo, v.
Peter Mar-
quis.** In replication the plaintiff alledged that his mother never was in want of money and that the plaintiff, having resided within the city of Calcutta, was wholly ignorant of the existence of any proclamation.

Among the documents filed by the parties were a certificate, that the widow of T. Huit, senior, was entitled to a pension of 20 Rs. per mensem. A Pottah signed by the Collector. Letters of administration granted to Lucy Hutt, widow of the intestate, deceased, dated in 1792. Tax bills for T. Hutt's houses, in Calcutta. A letter from (J. Miller) apparently son of Lucy Hutt, stating the sums expended in the repairs of her houses. Pottah to P. Marquis, dated 21st of April 1815, for property in Entally described as being late the property of T. Hutt. Bill of sale to T. Hutt of one *beegah* three *cottahs* from Panchoo Das. Ditto of thirteen *cottahs* from Sookhdeb. Bill of sale by Lucy Hutt to the defendant in her capacity of administration to the estate of T. Hutt. Various witnesses were produced who supported the respective allegations of the plaintiff and defendant.

On the 21st of February 1819, the Judge of the suburbs gave judgment in favour of the plaintiff, considering that the sale by the plaintiff's mother during his minority was not valid and could not be upheld; disbelieving the allegation as to the necessity which existed for raising money to repair the other houses, and, admitting its truth, being of opinion that it did not confer the power to sell. The defendant was at the same time declared at liberty to sue the plaintiff's mother for the recovery of the purchase money.

The above decree, however, was reversed on appeal by the Calcutta Provincial Court, on the 24th of December 1821. The Second and Third Judges of that Court expressed themselves of opinion that the price paid by the defendant for the property to the plaintiff's mother was a fair and reasonable price, with reference to the value of property at the time; that, according to the law by which the succession of the parties to the deceased's estate was to be regulated, the plaintiff was entitled to two-thirds and his mother to one-third—consequently the sale by her could not be held to be void; and that if the plaintiff deemed the price received by his mother to have been inadequate, he was at liberty to indemnify himself by making an equivalent deduction from her share of the property upon coming to a division of it with her.

From this decision an appeal was preferred to the Court of Sudder Dewanny Adawlut, by T. Hoo, attorney for the plaintiff, who had died in the interim. On the 12th of June 1826, the Second Judge of the Sudder Dewanny Adawlut (C. Smith), recorded his opinion that the decree of the Court below should be amended, and that the sale by the mother of the plaintiff should be held to be good and valid for one-third of the property and no more, she being entitled to so much only and consequently without authority to dispose of more. On the 7th of April 1827, the Fifth Judge (A. Ross), declared his opinion that the decree of the Court below should be affirmed. He observed that the name of Peter Marquis was registered in 1815, as proprietor of the land purchased by him, that is five years after the plaintiff had attained the age of majority, and that the objection should have been

urged before; that the plaintiff's mother had clearly a right to one-third of her husband's property, and that it had not been by any means established that the property now under litigation, which she had disposed of, exceeded that proportion.

The case was next taken up by the Chief and Fourth Judges (W. Leycester and W. Dorin), who deemed it necessary to the formation of a correct judgment to consult the advocate general on the question of English law which it involved. On the 8th of May, the following question was accordingly propounded to that officer.

"Thomas Hutt, an Englishman, (in the pilot service), died in 1792, at Calcutta, leaving a widow Lucy Hutt, (a native of India), and Thomas Hutt, a son of the marriage, then a minor; and he left property, consisting of two houses within the town of Calcutta, and one house with 1 beegah, 17 biswas of land without the town at Entally; and sundry personals, besides about 1,000 Rs. in cash. Letters of administration were granted to the widow, (the deceased having died intestate) by the Supreme Court, in the same year. On the 7th of March 1800, the widow, as administratrix, sold the house and ground at Entally to Peter Marquis (not a British subject) for 500 Rs. and possession was given accordingly.

In the year 1811, the son (T. Hutt, junior,) became of age; and in 1818, but not before, brought a suit in the sillah Court of the suburbs, against Peter Marquis, then and now a resident of the suburbs, to set aside the sale, as made without due authority.

A Pottah seems to have been taken out by the purchaser in the usual form, and after the usual proclamation and notice, from the Collector's office, in 1815; and no hindrance seems to have been offered by Hutt, junior. He alleges that he did not know of it.

From the evidence in the case, the Court infer that the sale by the administratrix was not an indiscreet or unnecessary one; that it was made with a view to effect repairs in the two Calcutta houses—and for a purpose beneficial to the estate, and that the chief part of the proceeds was so applied, and no part applied to any unfit purpose. And the price, according to the rates of the time (though they are now higher) was not an inadequate one.

Your opinion is requested whether, under these circumstances, and considering the long possession of the purchaser under the sale, and the non-molestation of the minor for several years after he became of age; the Court would be justified under the English law, in upholding the sale, and leaving the son to get an account of the application of the proceeds from the executrix—or whether the sale must at all events be held invalid—that is to say, whether the decisions hitherto made by the Supreme Court recognize or not sales of land by an administrator; and if they do, whether the ground is narrowed to sales for the actual payment of debts, or is generally for purposes beneficial or necessary to the estate.

It should be observed that in the case in question, the estate was not insolvent; nor, as far as appears, had there been, when the sale took place, nor has there since been, any separate assignment of the respective rights of the widow and the son in the estate."

The reply of the Advocate General was to the following effect:

"There has been so much difference of opinion in the Supreme Court, upon the various questions connected with real property,

1857. in this country, that I feel some hesitation in giving my opinion on the case submitted to me from the Sudder Dewanny Adawlut. I believe, however, that it never has hitherto been decided that an administratrix of an intestate's estate could make a good title to a purchaser of any of the real property of the intestate, if he died solvent; and if lands in the *mofussil* are to be considered in any degree, in the light of estates in fee simple, which seems to have been held in the case of *Gardiner versus Fell*.—I, Jacob and Walker's reports—22, I do not know how such an administratrix can convey such estate. My own opinion is that she cannot, and that the vendee, under her conveyance, may at any time within 20 years, be ousted by ejectment. I am consequently of opinion that the Court would not be justified, under English law, in upholding the sale in question. But it seems to me that exercising (as I understand the *mofussil* Courts to do) an equitable, as well as legal jurisdiction, the Sudder Dewanny Adawlut may well require the heir-at-law to account for, and refund to the purchaser, such portion of the purchase money, as shall be proved to have been expended, for the benefit of the heir-at-law, on any other property to which he also succeeds; and if it can be shewn that he inherited from, or took under the will of his mother any property sufficient to make good the amount of the purchase-money, I think it would be consistent with the Rules of English Equity, to compel him to refund the whole amount of such purchase money, with interest—of course setting off such reduction against the mesne profits."

Having perused the above reply and taken into consideration all the circumstances of the case, the Chief and Fourth Judges recorded their opinion that the decree of the Provincial Court should be reversed and that the appellant should recover possession of the land sold, on condition of his paying, within the period of six months, from that date, the amount of the purchase money paid by the respondent to Lucy Hutt. Final judgment was passed accordingly. The decree did not provide for payment of interest, the Court deeming it probable that the mesne profits had exceeded the interest on the purchase money and it being deemed adviseable to leave that question open to future adjustment. The appellant and Lucy Hutt were left to adjust between each other the proportion in which each was to contribute to the refund.

T. Hoo, v.
Peter Mar-
quis.

MUSSUMMAUT WAJIDA, Appellant,

versus

KUREEM BUKSH, son of NADIR BUKSH, deceased, Respondent.

1805

July 14th.

THIS suit was instituted in the Patna city Court, on the 25th of February 1805, by the appellant's father, Fuseehodeen, against Nadir Buksh, *in forma pauperis*, to recover possession and be registered as proprietor of one-third of talook Iahbukhpoor, &c. in perganna Azeemabad. The action was laid at Rs. 1,766, being one-third of the triennial jumma and Rs. 2,166, one-third of the price realized by the public sale of the above talook, which was subsequently set aside—Total Rs. 3,932.

The plaint set forth that Moohammed Buksh, proprietor of the entire talook above mentioned, had a son named Nusrulla and a daughter named Tajun. After their death Kadir Buksh, Nadir Buksh, (the defendant) Deedar Buksh and Munnoo, the sons, and Mussummaut Rookun and Noorun, the daughters of Nusrulla, and the plaintiff Fuseehodeen, son of Tajun, succeeded as heirs, to possession of the estate, which, by the mutual consent of the parties, was managed by Kadir Buksh, who distributed to all their proper shares of profits—subsequently there was a dispute with Kadir Buksh relative to the plaintiff's share, namely, the third now claimed, and the case was made over for adjustment to Mooftee Koodrut Oolla and others. The decision was deferred and in the mean time, the talook was sold by public auction. Eventually, however, the sale was set aside on the suit of Nadir Buksh by the Sudder Dewanny Adawlut, who directed the appellant Nadir Buksh and his cosharers to pay the sum realized by the (sale Rs. 6,500), by the end of Bhadoon 1211 F. S., into the Bihar zillah Court, in order that the purchaser might be ejected and the appellant and his cosharers be put in possession of the talook. The plaintiff accordingly requested Nadir Buksh to receive from him Rs. 2,166, being one-third of the proceeds of the public sale, and record his name for the share claimed, in order that he might obtain possession thereof in virtue of the decree passed by the Sudder Dewanny Adawlut, but Kadir Buksh would not listen to the proposition. The plaintiff accordingly now sued and was ready to pay the sum of Rs. 3,933, as the amount of revenue and proportion of purchase money due on the third share now claimed.

Nadir Buksh stated, in reply, that the plaintiff's mother had never succeeded to the share now claimed, nor had the plaintiff ever enjoyed any portion of the profits realized from the estate. He (the defendant) his father Nusrulla and his brother Kadir Buksh had been in possession of the talook for more than sixty years, and, in consequence of this long lapse of time, the plaintiff's claim was inadmissible, under the regulations. The alledged reference of the dispute regarding a share of the talook to Mooftee Koodrutoolla and others was altogether untrue. After the sale took place, he (the defendant) had sought redress from Government, and in the zillah Provincial and Sudder Courts, and after much trouble, and an outlay of Rs. 20,000, had obtained a decree

1837.
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mant Wa-
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Bukah.

from the Sudder Dewanny Adawlat, setting aside the public sale and directing him (the then appellant) and the other sharers to pay into the Behar Zillah Court, by the end of Bhadoon 1211 F. S., the sum of Rs. 6,500, being the amount realized by the sale, and providing that, in the event of their failing so to do, the decrees of the zillah and Provincial Court should stand, and that they should forfeit all claim and title to the estate in dispute. He paid the specified amount into the Court, in Bhadoon 1211 F. S., out of his own funds and obtained possession of the talook at the commencement of Assin 1212 F. S. Had the plaintiff been entitled to a share, he would have deposited his proportion of the money in the Court within the prescribed period. The rights of all the sharers were now forfeited in consequence of their having failed to make good the proceeds of the sale.

The plaintiff, in replication, contended that as the defendant had received advances on the estate, which was joint property from Choonee Lal and Motee Ram, *Mahujuns*, and had appropriated part of the money thus realized to the payment of the proceeds of sale, it was the joint act of all the sharers, and, consequently, the defendant's plea on this point was frivolous and futile.

On the 27th of July 1808, the Judge of the City Court, in passing judgment, observed that as the plaintiff grounded his claim to a share of the talook in dispute, (the estate left by the late Moohummud Buksh), on the fact of his being the son of his daughter (Musummaut Tajun), which was not denied by the defendant; as neither the plaintiff nor his mother were ever in possession of a share and as it had not been established by the evidence adduced that either of them enjoyed the profits of such share, and as the plaintiff had himself stated that forty years had elapsed since his mother's death his claim was inadmissible in consequence of the lapse of time. He therefore dismissed the suit.

Fuseehoodeen appealed to the Patna Provincial Court, *in forma pauperis*, and was succeeded on his death by his son Moohummud Ali in the prosecution of the claim.

The *Futwa* of the *Mooftee*, in reply to a question proposed by the Second Judge of that Court stated, that the estate of Moohummud Buksh if distributed among his family according to the law of inheritance, would be divided into thirds, two of which would go to his son Nasroolia and the other to his daughter Tajun, and that, if she left no other heir, her share would devolve on Fuseehoodeen and on his death on his heirs.

The Second Judge, finding from the answer of his law officer and all the proceedings in the case that Fuseshoodeen, son of Tajun, was entitled to a third of the estate of Moohummud Buksh and that Fuseshoodeen had stated in his plaint his readiness to pay Rs. 3,933, his proportion of the *malgoozaree* and of the proceeds realized by the sale of the above share—recorded his opinion, on 17th of May 1813, that possession of the share should be awarded to his heir Moohummud Ali, on paying the above sum and the order of the Patna City Court reversed. But the Senior Judge of the Court, in concurrence with the Third Judge, affirmed the decree of the Patna City Court, on the 8th of June 1813, and

CASES IN THE SUDDER DEWANNY ADAWLAT.

dismissed the appeal with costs to be levied on any of the appellant's property that might be hereafter forthcoming.

Mohummud Ali presented a petition for a special appeal to the Sudder Dewanny Adawlut, which was then rejected but subsequently to his death and in consequence of a decree passed by this Court, in another case, in which the same parties were respectively appellant and respondent, the application of the present appellant, (the sister of Moohummud Ali) for permission to be admitted to a special appeal for 26,049. In three times the sudder jumma of the share claimed, was acceded to, in consideration of certain circumstances set forth in the above decree. Nadir Buksh was succeeded on his death by his son Kureem Buksh. The case came to a hearing originally before the Second Judge (C. Smith), on the 18th of January 1826, who recorded his opinion to the following effect.

"It is clear that the talook in dispute was the property of Abdoosulam, one moiety of which descended on his death to Allah Buksh, his elder son, and the other to his younger son Moohummud Buksh. Moohummud Buksh died, leaving as his heirs one son Nusroolla and one daughter Tajun. This Tajun died leaving Fuseehooddeen the original plaintiff in this suit her heir. His right therefore to one-third of Moohummud Buksh's moiety of the above estate is clearly made out and does not admit of doubt or dispute. The other pleas of the respondent with regard to the lapse of time, and his having paid the sale money, &c. have been fully considered and disproved in the decree (No. 1680), passed on the 26th of March 1821. On reference to the papers of case No. 1381, decided by this Court, on the 24th of November 1818, it appears that in awarding possession to Gour Buksh (one of Allah Buksh's family and the respondent on that occasion) the Court provided that he (the respondent) should obtain possession on paying to the *Mahajun* the balance of half the proceeds of sale due from his share, deducting whatsoever might have been realized as profits therefrom, and, if the *Mahajun* refused, he was at liberty to sue him for possession. When afterwards the *Mahajun* would not relinquish the share of Gour Buksh without a suit, the latter prosecuted him in the Patna Court, and, on the 12th of December 1821, got a decree awarding him possession of his share and the sum of Rs. 73,250, as principal and interest of surplus profits appropriated beyond the amount of the sum due from the years 1212 to 1228 R. S.—Byjnath Sahee and others, appealed to this Court but the matter was compromised by the parties for Rs. 34,000—such an amount of surplus profits being found due from the *Mahajun* on account of the moiety belonging to Allah Buksh's family, it is unnecessary for the Court to direct in this case, which refers to the other moiety held by the same *Mahajun*, that Mussummaut Wajida, the appellant (own sister to the late Moohummud Ali son of the plaintiff Fuseehooddeen) shall pay any thing to obtain possession of the share in dispute; the said Mussummaut Wajida being clearly entitled as residuary to a third of her father's property and on her brother's death to his entire share, to half of it at her specific portion and to the other half by return or *Radd*." He was, therefore, of opinion that the decision

1827.
Mussummaut Wajida, v. Kureem Buksh. both the lower Courts should be reversed, the appellant put immediately and unconditionally into possession of one-third of Allah-Buksh's moiety of *talook* Ilabbukshpoor, &c., all costs paid by the respondents, and the appellant left at liberty to sue the *Mahajun* for the surplus profits due on such share.

The Fourth Judge (W. Dorin), next took up the case and having gone through all the proceedings connected with it, expressed his opinion that Mussummaut Wajida, who now prosecuted the appeal, as heir of the original plaintiff since deceased, could not well be excluded from her share for the reasons detailed in his proceeding on the former cause : No. 1680,—dated March 26th 1821 ; because two branches of this family had already recovered, under the decree of the Sudder Dewanny Adawlut, passed on the 19th of December 1803, and the meaning of the clause in the decree in favour of all the heirs was further explained in the Courts proceeding of the 30th of January 1804. He, therefore, thought that Wajida, who now claimed as a daughter (she in the former case claimed separately and distinctly as wife of Deedar Buksh) and as heir of the original plaintiff Fuseehodeen, her father, (her brother Moohummud Ali being now dead), was entitled to possession of the share due to her father, namely, one-third of the moiety of *talook* Ilabbukshpoor, &c., which constituted the estate of Moohummud Buksh, on paying her proportion of the sum of Rs. 6,500.

And as the profits of the other moiety of the *talook*, which was in the possession of Byjnath Sahee, alias Birj Lal, son of the late *Mahajun* Motee Lal and Mussummaut Radha Beebee, wife of the late *Mahajun*, turned out, on the suit of the half sharer Gour Buksh against the *Mahajun*, appealed to this Court by Byjnath Sahee, and compromised, on the 26th of May 1824, for Rs. 34,000, to have cleared off the debt and left a balance against the *Mahajun*, it was presumable that the portion in question would also have cleared the debt due on it and would also yield a balance, being possessed by the same *Mahajun* as security for the payment of Rs. 6,500, or according to their account of Rs. 8,000, and that instead of an order for possession on paying the *pro rata* part of 6,500 Rs. there should be an order for possession, or declaring right to possession, on paying what was due on account, which would be nothing. As, however, the *Mahajuns* were not parties to the present suit, although he (the Fourth Judge) concurred with the Second Judge in thinking that the decrees of the Provincial Court and Patna City Court should be reversed, and the plaintiff's claim to one-third of Moohummud Buksh's estate adjudged, yet he considered it expedient, before passing any final order in the case, to issue a notification to the *Mahajuns* calling on them, in the event of their refusing to relinquish possession to the appellant, to state their reasons to the Sudder Dewanny Adawlut or Provincial Court.

A notification to this effect was accordingly issued with directions to the Provincial Court to serve it on the parties. The return of the Provincial Court submitted two petitions from Radha Beebe and Byjnath Sahee, heirs of the mortgagees of *talook* Ilabbukshpoore, and the Court, being of opinion that the return exhibited no reason why they should not award to the appellant,

possession of her father's third share of Mochammud Buksh's estate, a decree was passed on the grounds already specified, awarding to the appellant immediate and unconditional possession of the share claimed and reversing the judgment of the lower Courts. The respondent was ordered to pay all costs.

MOHUNT TEEKUMBHARTEE, Appellant,
versus
 SYUD IHSAN ALI and others, Paupers, Respondents.

THIS suit was instituted in the Patna Provincial Court, on the A lease 21st of November 1814, by Syud Ibrahim Ali, from whom the granted in respondents inherit, *in formā pauperis*, against Goasain Munnee- consideration of an rambhartee, to recover possession of mouza Jorawumpoor, &c. &c. advance certain rent free villages in perguntas Churwah Sircar Hajeepoor of a sum zillah Tirhoot, Rs. 12,600, being stated as eighteen times the annual produce and Rs. 6,512, excess of Matikana—total Rs. 19,112. held to be equivalent to a mort-

The plaintiff represented a moiety of the villages in question, as gage, and the property of the plaintiff, one-fourth as belonging to Mussum- maut Rumzanee, *alias* Sookhoo, and the remaining fourth to Meer Ameer Ali. These three persons in consideration of advances to such sur- the amount of Rs. 4,001, farmed them to the defendant for seven plus pro- years from 1200 to 1206 F. S. inclusive, and executed a lease declared stipulating that the proceeds of the estate during this period remained should be divided into three equal portions; two of which should be enjoyed by the farmer as interest, and the remaining share be appropriated by themselves subject to contingent expences. The principal villages constituting the plaintiff's moiety were accordingly at that time (1221 F. S.), in the possession of the defendant who between est. 1200 and 1221 F. S. had realized therefrom a net profit of Rs. 10,513. Deducting therefore Rs. 2,000—as the plaintiff's share of the sum originally advanced, and a like sum for interest in con- formity with regulation 16, 1793; altogether Rs. 4,000 there re- mained a balance of Rs. 6,512, in favour of the plaintiff who now sued in consequence of the defendant's having refused to liquidate the debt or to relinquish possession.

The defendants in reply acknowledged the grant of the farm in consideration of advances to the amount of Rs. 4,001; but main- tained that it was stipulated in the deed of lease, that, in the event of the money not being made good within the prescribed period, the lease should be continued till payment was made. As the whole advance had not been refunded the plaintiff's present claim to annul the lease on the plea that the principal of the money borrowed had been realized with interest, from the proceeds of the land in question was quite untenable, inasmuch as the transac-

1827. *Mohunt Teekum-blurtee, v. Syud Ihsap Ali and others.* tion took place before the enactment of regulation 15, 1793, and the profits of the land legally belonged to the lessee. The plaintiff had besides contracted for his (the defendant's) seven years *moostajree* rights, but had during that time only allowed him a profit of Rs. 3,140. On the expiration of the lease, in 1207 F. S., Meer Ameer Ali and Mussummaut Rumzanee on paying Rs. 1,600 for the entire *mouza* Govindpoor and Rs. 1,200, for half of *mouzas* Jorawunpoor and Gopalpoor, altogether Rs. 2,800, obtained possession and he (the defendant) still held the other moiety of the latter villages and lands in lieu of Rs. 1,200. The plaintiff had, since 1207, continued to receive from him Rs. 101, *per annum*, as *ajiree* rights for the residue of the property held in farm.

The plaintiff in replication contended that an advance of money on a lease was equivalent to a mortgage and the profits realized from the farmed property were the same as interest. Regulation 15 of 1793, limited interest to 12 *per cent per annum*. The defendant, however, with a view to obtain a higher rate of interest had disposed of his *moostajree* rights to him (the plaintiff) in farm at an *annual jumma* of Rs. 720, from 1200 to 1206 F. S. inclusive, made him execute a *kubooleut* and had continued for five years, till 1204, F. S. to receive rent at that rate—and a further sum of Rs. 230, *per annum*, in the name of Koondun Singh as *suzawul* expences. In 1205 F. S. he cancelled the lease and took a two years farm (for 1205 and 1206 F. S.), of all the above villages at an *annual jumma* of Rs. 901—under the ostensible name of his dependant Jyemul Mohunt from him (the plaintiff) Ameer Ali and Mussummaut Rumzanee; and prevailed on them to allow Jyemul Mohunt, a salary of Rs. 600, *per annum*, from his two *moostajree* shares; appointed his own *omla* over the villages in question: collected and appropriated from the villages which formed his (the plaintiff's) moiety Rs. 450, in 1205 and Rs. 450 in 1206 F. S., refused to receive Rs. 4,000, the amount of his advances when offered to him and retained possession of the entire villages in dispute with the exception of a four anna share in *mouza* Govindpoor, belonging to Meer Ameer Ali which had been sold by public auction, in 1202 F. S. Subsequently Ameer Ali and Mussummaut Rumzanee had repaid to the defendant one-half of his advances and had become possessed of half *mouzas* Jorawunpoor, Gopalpoor and of a four anna share of Govindpoor—and as the defendant had fraudulently received usurious interest in contravention of the regulations, he (the plaintiff) was not liable for the remaining moiety of the advances.

The plaintiff was succeeded on his death by Syud Ihsan and Sulamut Ali, his sons—Mussummaut Babee Mobaruk, Babee Goondoo, and Beebun, his wives—and Mussummaut Nikalee, Kojun Zebun, Oofut, and Oomna his daughters. The defendant was, on his death, succeeded by his *Chela* Peekumbhartee.

Off the 6th of December 1822, the plaintiff's *vakeel* represented to the Third Judge of the Provincial Court, that his client intended to sue separately for restitution of his share in Govindpoor, which had come into the possession of Ameer Ali by the collusion of the defendant—and that *mouzas* Jerayuapoer and Gopalpoor

had been publicly sold towards the end of 1225 F. S. He therefore requested that the present decision might be restricted to the question of excess profits realized.

The Third Judge observed, that the defendant had stated Rs. 1,200 to be due from the plaintiff, and the remainder of the advance of Rs. 4,000, to have been repaid by Ameer Ali and Mussummaut Ramzanee. This sum must therefore be realized from the profits of the plaintiff's share. It was stipulated in the deed of lease that one-third of the profits should belong to the lessor and two-thirds to the lessee. And it appeared from the defendant's answer to the plaint, that the defendant, after Ameer Ali and Mussummaut Rumzanee were seized of the entire *mouza* Govindpoor and half Jorawynpoor and Gopalpoor on the expiration of the lease, allowed the plaintiff Rs. 101, *per annum*, every year as his *ajiree* rights, and accordingly accounts were produced to prove the receipt of Rs. 101, *per annum*, till 1221 F. S. but no document had been submitted by the defendant to shew the payment of *ajiree* rights to the plaintiff from 1222 to 1225 F. S., at which time the plaintiff's share had not been sold. It was therefore clear from the defendant's shewing that the profits of the plaintiff's share were not less than Rs. 303, of which Rs. 101, had been paid to the plaintiff as his rights as lessor, and the remaining two-thirds, viz. Rs. 202, appropriated by himself as lessee. And although there was reason to suppose that the profits of the plaintiff's share had been undervalued, yet no proof had been adduced by the plaintiff to this point. The defendant's plea that the profits of property let in lease were the legal perquisite of the lessee was quite untenable, as the regulations viewed a farm of this nature as a mortgage. Regular accounts under the signature of the plaintiff's *vakeel* were appended to the papers of the case. From these it appeared that the principal of the advance had been realized with interest in 1211 F. S. from the profits of the plaintiff's share leaving a balance in his favour of Rs. 199. From 1212 to 1225 F. S., there was due to the plaintiff a sum of Rs. 5,586. 14. 13. on account of principal and interest of the *annual* proceeds realized from his share. He therefore passed a decree awarding this amount to the plaintiff and making all costs payable by the defendant.

The appellant appealed to the Court of Sudder Dewanny Adawlut against the above decision, and the respondent appeared to plead *in formā pauperis*.

The case came to a hearing before the Second Judge (Mr. C. Smith), on the 14th of July 1827, who, having maturely weighed the whole of the pleadings, recorded his opinion that there was no ground for altering the judgment of the lower Court. On the contrary he considered that judgment to have been too lenient towards the appellant. For the original transaction which took place, on the 14th of *Rubee-oossanee* 1207 A. H., was plainly fraudulent and had for its object the attainment of a higher rate of interest, than was allowed by the regulations. The appellant evinced his design by immediately forming a contract, by which he realized Rs. 720, *per annum*, on the sum of Rs. 4,000, the legal interest of which was Rs. 480. In 1205 and 1206, he obtained an

1827. additional sum of Rs. 1,200, *per annum*, and from 1207, to the date of the present suit, and afterwards till 1225 F. S. he received Rs. 202, besides the Rs. 1 $\frac{1}{2}$ 00—(a like amount being still due from the share of Ibrahim Ali, the respondent's ancestor), and the legal interest thereon being Rs. 144. If, therefore, the Provincial Judge had, on the ground of the interest being usurious and the manner in which it was received fraudulent and improper, entirely disallowed the appellant's claim to principal and interest under regulation 15 of 1793, and had awarded it to the respondents such a proceeding would not have been irregular and he would have been justified in so doing. But as the respondent had not appealed on this point it was only necessary to confirm the order of the Provincial Court. He therefore dismissed the appeal with costs and confirmed the judgment of the Patna Provincial Court.

1827. MOOHUMMUD HOOSEIN, son of NISAR ALI, Appellant,
versus
July 24th. GUNPUT SINGH and BHOWANEE BUKSH, Respondents.

The term of sixty years specified in clause 3, section 3, regulation 2, 1803 held not applicable to a suit for lands in Allahabad instituted upwards of twelve years after the date of the cession, the cognizance of which is prohibited by section 18, regulation 2, 1803.

ON the 3d of October 1826, Nisar Ali, the father of the appellant, brought an action against Gunput Singh, one of the respondents, in the zillah Court of Allahabad, to recover possession of the *talook* Soondi, parganna Secundra, the yearly *jumma* assessed upon which was stated to be 2,400 Rs. The plaint was to the following effect. My grandfather Gholam Fureed was zemindar of the *talook* in question. He placed his minor son Booniad Ali under the care and protection of Bussawun Singh, (grandfather of the defendant) with whom he had contracted a great intimacy, and enjoined him to pay the rents punctually. Shortly after this Gholam Fureed died, and the person above-named as having been appointed guardian by him, allowed, for the expences of the minor, eight *anas*, *per diem*, out of the profits of the estate, besides assigning to him fifteen *beegahs* of land, and all the perquisites of the zemindaree. When Booniad Ali came of age, Dureao Singh the father and Hulhul Singh, the uncle of the defendant, refused to relinquish possession of the estate. Booniad Ali, consequently executed a *kuboolat* or engagement for the zemindaree in his own name, in the time of the Nawab Syud Moouziz Khan the Nasim. The above-individuals, instigated by enmity at this transaction, caused a night attack to be made upon the plaintiff's house, in which outrage his relation Mochummud Ghous was killed. Subsequently to this Dureao Singh had the address to get a *Pottah* and executed a *kuboolat* in his own name, assigning to the plaintiff for his support four *beegahs* of land in addition to the quantity which he formerly enjoyed. However, in the time of Ismael Khan and Nawab Ameer Khan, Nasim of the Souba, the plaintiff

was again recognized as proprietor, holding the estate in the name of his son Sheikh Badul. When the *talook* was taken under the special management of Government, Amrur Khan granted him all the proprietary dues; as did Sheo Bukah Rai the *canoongo*, and Dureao Singh, the father of the defendant, during the periods in which they held possession of the zemindares. In the same manner, also, during the Government of Raja Khooshhal Rai, he was recognized as the undoubted proprietor. In the year 1209 F. S. when questioned by Boond Sein, the *naib tehsildar*, Dureao Singh admitted that the proprietary right to the zemindares was vested in the plaintiff's grandfather Gholam Fureed and his heirs, and that his possession was that of a guardian only. The *naib tehsildar*, on this, granted the estate in farm to a person named Ramshewuk, when Gunput Singh, the son of Dureao, instituted a fraudulent action against the said Ramshewuk, claiming the proprietary right, and his claim being supported by the evidence of two or three of his relations, he obtained a decree to the prejudice of the plaintiff's right. All the inhabitants of the pergunnah are acquainted with the fact that the estate is the ancestral property of the plaintiff and that it was parted with on trust only by his grandfather, in further proof of which the plaintiff is able to produce duly attested copies of the reports of the *cahoongees* of Secundra, the originals of which are deposited in the Collector's office.—On the above grounds the plaintiff sued for redress.

The defendant, in reply, alledged possession on the part of his father and grandfather for a period of seventy years. He affirmed that in the time of Raja Pirthee Put, the estate fell into arrears and that the then possessors were not able to make good the arrears; that Moohumimud Akrum, the *talookdar* of Chounsee, was desirous of paying up the arrears and possessing himself of the property, but the grandfather of the defendant, not wishing to have him for a neighbour, himself paid into the Treasury of the aforesaid Raja, the arrears of Revenue, amounting to 6,200 Re. and obtained an order for exclusive possession of the *talook*, which he took possession of accordingly in the year 1209 F. S.; that in consideration of the poverty of the plaintiff's ancestors a small portion of land was assigned to them for their support by way of charity; that at the first settlement, namely, that from the year 1210 to 1212 F. S., the *naib tehsildar* of the pergunnah having granted the property in farm to Ramshewuk, that individual dispossessed the defendant, in consequence of which he sued for the proprietary right in the zillah Court of Allahabad, adducing, in support of his claim, the grants of former Governments; that the zillah Judge passed a decree in his favour which was affirmed on Appeal by the Provincial Court, and an order for possession was granted by the Collector, in the year 1214, since which the defendant had been in the unmolested enjoyment of the property. The defendant finally urged that had the plaintiff's ancestors had any right to the lands, except as *aymedars* (which right had been forfeited by lapse of time) they would not have been silent during the time of Raja Khooshhal Rai, when the property was delivered over to the possession of Sheo Buksh Rai, against whom the defendant's father brought an action and whom he succeeded in ousting.

Moohumimud
Akrum,
Boond Sein, &c.
Gunput
Singh and
another.

1827. **Moobumud Hoosein, v. Gunput Singh and another.** On the 7th of April 1807, the zillah Judge dismissed the claim of the plaintiff with costs. He observed that the plaintiff had not been able to adduce any document such as a bill of sale or other voucher in support of his claim; that it appeared on an inspection of the decrees of the Courts, dated the 15th of January and 6th of August 1806, filed by the defendant, that he had formerly brought suits to establish his proprietary right to the estate in dispute against Deokinundun, Ramshevuk and Boond Sein, and had obtained decrees, and that consequently the present claim was wholly unworthy of being attended to.

The plaintiff being dissatisfied with the above judgment appealed to the Benares Provincial Court, by the First and Third Judges of which, however, the decree of the Court below was affirmed on the 7th of February 1811.

Nisar Ali being dissatisfied with this decision also, preferred a petition to the Court of Sudder Dewanny Adawlut, praying for the admission of a special appeal, *in formā pauperis*. On the 23d of November 1824, the petitioner was directed to conform to the conditions required of special appellants, but he died about this time, and, on proclamation, no one of his heirs appeared to prosecute the suit. At length, in the year 1821, Moomumud Hoosein the son of Nisar Ali, made his appearance; and, pleading his minority as the reason of his not having sooner come forward, his excuse was received and the appeal was finally admitted on the 19th of January 1823.

After hearing the pleadings on both sides, the Second Judge of the Sudder Dewanny Adawlut (C. Smith), recorded his opinion, on the 19th of January 1826, as to the merits of the case to the following effect. "The decree of the Benares Provincial Court, in the case of Deokinundun Singh and others, appellants, *versus* Gunput Singh, respondent, dated the 6th of August 1806, in which case Nisar Ali the plaintiff in this case and father of the appellant was not a party concerned, can form no just ground for dismissing that plaintiff's suit. As to the case of Bhowanee Buksh, appellant, *versus* Gunput Singh which was determined in this Court, on the 2d of January 1823, it clearly appeared from the evidence therein adduced that the estate in dispute originally belonged to a *moosulmaun* family. It appears, also, from the decree of the Benares Court, in this case that they dismissed the appeal, and affirmed the decision of the zillah Court, without hearing any of the witnesses named by him in support of his claim and without assigning any reason for the omission." Under these circumstances he was of opinion that the evidence of the appellant's witnesses should be taken and that notice should be served on Bhowanee Buksh, calling on him to appear as respondent in the case, if appearing, from the decree above adverted to, that a third of the property now in dispute had been adjudged to him. An order to the above effect was issued to the Benares Court of Appeal and the terms of it having been complied with and a petition having been presented by one Moortaza Hoosein asserting a right to participate in a moiety of the disputed *takoot*, the Second Judge, on the 2d of June 1827, recorded his final judgment in the following terms. It has been clearly established by all the evidence adduced by both the parties in this and the former

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cases, as well documentary as oral, that the *taleek* in dispute was formerly the property of Sheikh Gholam Furesd, the father of Booniad Ali, and grandfather of Nisar Ali; and that it was usurped by Dureao Singh, father of Gunput Singh, during the minority of Moortaza Hoosain, the grandfather of the appellant. It also appears that from the date of Dureao Singh's usurpation to the date of the claim by Nisar Ali, which was preferred on the 1st of October 1806, a period short of sixty years has elapsed. The decree in a former case to which neither the appellant nor his father were parties cannot operate as a bar to the award of the right of the appellant in the present, instance. It further appears from the decree in the case of Gunput Singh, plaintiff, *versus* Boodh Sein and others, defendants, dated the 15th of January 1806, corresponding with 1213 F. S., that, at the period of the triennial settlement for Allahabad, which took place, in 1210 F. S. Dureao Singh the father of Gunput was present and that the possession of Gunput, the heir of the usurping party, commenced from the date of that decree. But the claim of Nisar Ali, the appellant's father, was instituted in the month of October 1806. There can therefore be no doubt that the claim is cognizable under the provisions of section 3, regulation 2, 1805, and that the appellant is clearly entitled to the property which he claims. As to Moortza Hoosein, whose petition was not presented, until the 19th of July 1826, and who did not come forward in either of the Courts below, it will be sufficient that he be directed to establish his relationship and consequent right to participate by the institution of a regular suit. On the above grounds the Second Judge proposed that the claim of the appellant should be adjudged and the decree of the Court below reversed. On the 12th of July 1827, the Third Judge (C. T. Sealy), before whom the case was next brought, recorded his dissent from the above judgment and his opinion that the decrees of the Courts below should be affirmed. He observed that by the first clause of section 18, regulation 2, 1803, the Courts of Adawlut are prohibited trying or determining the merits of any civil suit whatever, if the cause of action shall have arisen before the 10th of November 1801, of which description this case was, and that even admitting the fact of its being cognizable under that regulation, still the claim was not maintainable under the provisions of regulation 2, 1805, because Bussawun Singh, who was alledged to have usurped the property, held it during his life time and after his death his son Dureao held possession for a period of thirty or forty years; and that, under these circumstances, the claim of the appellant should be rejected.

On the 24th of July 1827, the case came finally to a hearing before the Fifth Judge (A Ross), who delivered his judgment to the following effect. "Dureao Singh, the ancestor of the respondents, was in possession of the disputed *taleek* for more than thirty years, before the 10th of November 1801, the date on which the Province of Allahabad came under the British Government. On this ground possession was awarded to Gunput Singh by the decree of the zillah Court, dated the 15th of January 1806, and that decree, on an appeal being preferred by Boodh Sein, Ram Shewuk and the other defendants, was affirmed by the Benares Court of Appeal. Besides

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there does not appear to be any proof that the possession of Dureao Singh was that of a guardian or farmer, or that the plaintiff received any zamindaree dues or land in lieu thereof, either during the time of Dureao's possession or subsequently thereto. Under these circumstances concurring with the Third Judge, I am of opinion that the claim of the appellant should be dismissed that the decrees of the Courts below should be affirmed, and that the appellant should defray the costs of suit incurred in all three Courts by himself Ganput Singh and Bhawanee Buksh; but that, the appellant being a *pauper*, the respondents should, in the mean time, pay a moiety of their *vakeels* fees, leaving them to be reimbursed from any property which may hereafter be found to belong to the appellant."

A final order was passed accordingly.*

* On the 15th of April 1828, the subjoined reference connected with this subject was received from the Judge of zillah Gorukhpore. "It has been questioned here, whether the prohibition set forth in the latter part of clause 3, section 18, regulation 2, 1803, against hearing any suit for private claims, in which the cause of action shall have arisen before the 10th of November 1801, from and after the 10th of November 1813, has not been done away with by regulation 2 of 1805.

To me it appears that the prohibition continues in full force, and I find in the case *vakeel* of Government, appellant, v. Musaummat Rajenree Dibia and others, respondents, (Macnaghten's Reports, vol. 2, page 16, lines 7 to 11, from the bottom), the corresponding enactment for Bengal stated in general terms as still in force. That case might, however, be considered as coming more properly under the enactment regarding public claims, the Sudder Dewanny Adawlut appearing to have considered the ouster of respondents by the Revenue authorities without suit, as equivalent to a suit. But in the case of Moolummud Yarkhan, appellant, v. Moolummud Esan Khan, respondent, (Macnaghten's Reports, vol. 3, page 294, line 12 from the bottom), the same enactment is held in force in a distinctly private claim. I should not therefore have troubled you on the subject; but the doubt having been raised, and there being no printed decision for these provinces, or authorised construction, by which, I can prove my point, I request the favor of your obtaining for me the decision of the Superior Court on the subject. If as I presume, the point referred to be considered clear and requiring no discussion, may I request the further favor of your forwarding me the decision of the Court without delay, as with reference to some matters of importance in agitation here it is desirable, I should be possessed of it at as early a period as possible. To the above reference the following reply was sent. "The Court of Sudder Dewanny Adawlut have had before them your letter, dated the 2d instant, requesting their opinion as to whether the prohibition set forth in the latter part of clause 3, section 18, regulation 2, 1803, against hearing suits for private claims has been superseded by the provisions of regulation 2, 1805. In reply, I am desired to communicate to you the opinion of the Court that, notwithstanding the mention of the period of 60 years, in the regulation last cited, no claim can now be heard, which had its origin beyond the date of the cession, and this without any reference to the mode in which the possession may have been, or may be alleged to have been, acquired, and that consequently the rule contained in clause 3, section 18, regulation 2, 1803, remains in full force."

On the 26th of September 1826, the Court came to a similar resolution on an analogous point.

In the case of MURDUN SINGH and others,

versus

NUJEEB ALI and others.

Before Messrs Leycester and Dorin, in which it was held that notwithstanding the 60 years mentioned in regulation 2, 1805, no claim can go back beyond the date of the cession, and this without reference to defendants possession having been fair or unfair.

Mr. Ross on the point of construction being put to him, concurred.

1857.
Aug. 21st.

**CHYTUN CHOWDREE and others, Appellants,
versus
BEER SINGH MAHTOON and others, Respondents.**

THIS action was instituted in the zillah Court of Purnea, on the 13th of June 1814, by Poorun Chowdree, the father of the appellants, to recover two hundred *beegahs* of *lakhiraj* land. The respondents were the defendants in the suit.

It was stated in the plaint that the land in dispute was part of five hundred *beegahs* granted as a rent free tenure by virtue of a *sunnud*, dated in 1171 F. S., to Syud Quldar Ali by Nawab Sipahdar Jung, his grandfather. Syud Quldar Ali, sold the 200 *beegahs* in dispute to the plaintiff, for 718 Rs. executing a regular deed of sale for the same, which bears date the 28th of *Aghun* 1221. The plaintiff subsequently let the land in farm to Rugoona Nath Thakoor and Sohun Lal, at a rent of 40 Rs. *per annum*, and they proceeded to plough and cultivate it. Upon this the defendant Beer Singh Mahtoon, assisted and supported by Ram Pershad Mahtoon and Kishen Pershad Mahtoon, made his appearance on the land with two hundred men, forcibly dispossessed the renters aforesaid and cultivated the land on his own account. The defendant Quldar Ali in reply set forth, that the land belonged to his wife Uzeem Oonisa solely. He admitted that he had sold it to the plaintiff for 717 Rs. and that he had received 317 Rs. giving a deed of sale for the same. But the transaction on coming to the ears of his wife met with her disapproval and she afterwards sold the two hundred *beegahs* at a higher price, viz. for 795 Rs. to Beer Singh Mahtoon, gave a regularly attested deed of sale for the property and put him in possession. This induced the plaintiff to offer the same price of Rs. 795 adding 80 Rs. for the agent if the purchase should be negotiated. It was, however, refused by Uzeem Oonisa on the ground that she had already parted with the land to Beer Singh Mahtoon. The plaintiff then applied to the defendant Quldar Ali to receive the remainder of the purchase money and to conclude a purchase, but this was also refused.

The defendant Beer Singh Mahtoon stated, that he had purchased the land of Uzeem Oonisa through her agent Meer Quidar Ali and obtained possession accordingly. The defendants Ram Pershad Mahtoon and Kishen Pershad Mahtoon, denied that they were present when Beer Singh took possession of the land. The defendant Uzeem Oonisa stated in her reply that the land had come into her possession in regular descent from her maternal grandfather Meer Namdar Ali and that she had never consented to the sale of it by her husband to the plaintiff, but sold it herself to Beer Singh Mahtoon, executing a bill of sale and putting him regularly in possession, and further that the unauthorized sale, by her husband had occasioned a quarrel between her and him which was not yet reconciled. On the 1st of January 1821, the Officiating Judge of zillah Purnea gave a decree for the plaintiff with costs, on the following grounds; that no regulation and no custom appeared or was suggested in the defence by which the plaintiff

1827.

Chytun Chowdree and others v. Beer Singh Mahoot and others.

was disapled from holding the land he had purchased of Meer Quldar Ali. It was his (the Judge's) opinion that Uzeem Oonisa was aware of the transaction and made no opposition to it. At any rate the non-concurrence of husband and wife in the transaction was of no importance, while the deed of sale in the possession of the plaintiff was in every respect legal and valid.

The defendants appealed from this decision to the Provincial Court of Moorshedabad. In the interim the original plaintiff had died and was succeeded by his sons.

On the 19th of July 1822, the appeal was heard before the First and Second Judges of that Court. From the *futwa* of the law officer called for on that occasion it appeared that if the sale was against the will and without the concurrence of Uzeem Oonisa, it was illegal and invalid; and as it appeared to the Court that Uzeem Oonisa was not consenting to the transaction between her husband and the respondents father, the zillah decree was reversed with costs.

Petition was then made for special appeal to the Court of Sudder Dewanny Adawlut, which was granted and the appeal came to a hearing, on the 16th of April 1827, before the Second Judge (C. Smith) who recorded his opinion as follows.

"I give no credence to the statement of Quldar Ali that he did not receive the whole purchase money 717 Rs. as specified in the deed of sale, dated the 28th of *Aghun* 1221. F. S. and I have no doubt but that the full amount was received. Of the two deeds of sale, referred to by the parties to the suit, that held by the appellants is the valid one, as it bears the earliest date. As to the non-agreement of husband and wife to the sale by the former, it is very clear that in several similar transactions, they (Quldar Ali and Uzeem Oonisa) concurred and agreed, and looking to the bad character notoriously borne by the latter, I see no reason, in this instance, to credit her assertions respecting her non-agreement to the sale made by Quldar Ali to the respondents father. I would therefore reverse the decree of the Moorshedabad Court and affirm that of the zillah with costs." The Fifth Judge (A. Ross) concurring in the above opinion, a decree was passed accordingly.

GOVERDHUN DAS, Appellant,
versus
WARIS ALI, Respondent.

1827.

Sept. 5th.

THIS was a suit instituted in the Dewanny Court of the City of Benares, on the 31st of May 1816, by Anupun Das Sahoo to recover from Waris Ali the sum of 3,260 Rs. principal and interest of a bond, bearing date in Bysakh 1867, *sumbut*.

The plaint set forth that the above sum was due from the defendant being 1,054 Rs. interest on 2,206 Rs. the principal sum 600 Rs. paid by the defendant, having been subtracted from the balance of interest.

No defence was set up, and on the 26th of April 1819, judgment was given by the register for the plaintiff with costs, and interest on the amount till paid. The defendant appealed to the Provincial Court of Benares, stating that he had, on the 16th of September 1819, after the passing of the decree in the City Court, paid into the Treasury of the Court of zillah Ghazeopore, the whole amount of the award with the costs of suit, viz. 3,586 Rs. — anas. The plaintiff had demanded interest on this sum from the date of the plaint to the day on which he received it, and had filed a petition to that effect in the City Court of Benares, and that the appellant had also presented a counter petition explanatory of the case, but an order was passed for the payment of interest by the register. The appellant further stated, that as the amount of interest awarded by the City Court would make the interest more than double the principal, and as the plaintiff had been allowed in that Court to carry the sum of 600 Rs. paid by the appellant, to the account of the interest instead of the principal, he had appealed to the Provincial Court.

On the 23d of November 1822, the Second and Officiating Judges of that Court concurred in opinion, that the action of the respondent, in the City Court, and the decree passed thereon, it being for a sum of principal and interest of which the interest exceeded the principal, could not hold good. The sum paid by the appellant and acknowledged by the respondent, viz. 600 Rs. should have been carried to the account of principal. They therefore altered and amended the City Courts decree and awarded 3,212 Rs. to the respondent, with interest, from the date of the decree in the City Court till payment, and costs to be borne by the parties respectively.

Anoopun Das Sahoo dying, his son Goverdhun Das carried the case by special appeal into the Court of Sudder Dewanny Adawlut.

The reasons for granting the appeal were recorded in the proceedings of the Court, dated the 16th of June and 2d of July 1823, and the appeal was heard before the Second Judge (C. Smith), on the 16th of June 1827, and judgment given to the following effect.

"The decree of the City Court seems to have awarded to the plaintiff the principal sum as specified in the bond 2,206 Rs. interest thereon from the date of the bond to that of the

Interest exceeding the principal may be awarded when the excess has accrued subsequent to recourse to law for the recovery of the debt.

1827. plaint; interest on it (the principal) from the plaint to the date of the decree and interest on the total amount of these three sums added to the costs, from the date of the decree to that of payment: which appears to have been the 21st January 1821.

Goverdhan Das v.
Waris Ali.

Five separate sums then are due to the appellant, viz. one sum of principal, three of interest and one of costs, thus specified; the original sum of 2,206, interest thereon after subtracting 600 Rs., paid,—1,054. Interest on the original sum from the date of the plaint till that of the decree .769. Interest on the total of these sums from the date of the decree to that of the payment 358 Rs. Besides a sum of 325, as costs making the whole amount 4,712. The defendant has paid of this amount 3,586, there remains therefore due to the appellant 1,126, so that this appeal which is for 1,424, is for more than the amount due by 298. The carrying of the 600 Rs. paid by the respondent to the account of interest and not of principal was quite correct, inasmuch as that sum and more than that sum was then due as interest; and it is usual till the whole amount of interest is paid to carry any sums received to the account of interest and not of principal. As to what has been stated on the part of the respondent, respecting the interest exceeding the principal, the rule is that if the excess of interest had accrued before any steps are taken to recover it, it cannot be awarded in a Court of law. The case is far different when the excess has taken place after recourse to a Court of law and between such recourse and the date of the decision. In this case there was no necessity for an appeal from the zillah; the Provincial Court of Benares should have ordered an arbitration. I would reverse the Provincial Courts decree and affirm that of the City Court, with costs in the Provincial Court and in this Court as far as the award goes."

The Third Judge (C. T. Sealy) concurring in the above opinion, a decree was passed accordingly.

OOMACHURN BUNHOOJEA, Appellant,
versus
LUKHEE NARAIN and others, Respondents.

Oct. 3, 1817.

THE appellant was formerly plaintiff in this case. He sued for himself and on behalf of Tarneochurn Bunhoojea and other minor sons of Radha Mohun Bunhoojea, deceased. The action was brought on the 13th of January 1817, in the Calcutta Court of Appeal. The present respondents were the defendants in the suit, the object of which was to recover the sum of 16,666 Rs. on account of the principal of a bond and 6,572 Rs. interest on the same, in the name of Byjnath Mookerjea and the sum of twenty Rs. as charge incurred for serving a notice—total 23,258 Rs. The plaint was to the following effect.

With a view to obtain the execution of a decree for a zamindaree, situated in Durodoomna and other pergunnas, in Midnapoor, which had been passed by the Court of Sudder Dewanny Adawlut, in favour of Lukhee Narain Rai, Shama Pershad Nundee, Annund Lal Rai, Nund Lal Rai, Mudhoo Soodun Rai and Gunga Narain Rai, from which decree Mussummant Soolukhna, the widow of Soonder Narain Rai, had preferred an appeal to His Majesty in Council, it became necessary that the parties in whose favour the judgment had been given should furnish security to abide by the ultimate award. Those parties accordingly, through the instrumentality of their agents, Ram Nundee, Rughoonath and Hurchunder, applied to Radha Mohun, the plaintiff's father, and agreed to pay him the sum of 20,000 Rs. in consideration of his standing forward as their attorney and surety. After the plaintiff's father, in conjunction with the plaintiff's uncle, Kishen Mohun Bunhoojea, had become sureties and the security bond had been approved, they borrowed the sum of 20,000 Rs. from Byjnath Mookerjea, on the credit of the plaintiff's father and the responsibility of the agents aforesaid, to be appropriated as the stipulated compensation to the plaintiff's father and uncle, and, on the 16th of Sawyn 1220 B. S., the aforesaid persons executed, in favour of the plaintiff's father, a written engagement, containing several distinct conditions. In consequence of that engagement and their petition to the Court of Sudder Dewanny Adawlut, the decree of that Court was executed in their favour by means of the plaintiff's father, who subsequently died, leaving the plaintiff and his brothers heirs to his property—afterwards the parties who had contracted the engagement, with the exception of Shama Pershad Nundee, presented a petition to the Court of Sudder Dewanny Adawlut, to set it aside; but this petition was rejected. The appeal to His Majesty in Council, was withdrawn by Mussummant Soolukhna and the contracting parties, her opponents in the suit, obtained unqualified possession of the estate. Shama Pershad Nundee paid his proportionable share of the engagement amounting to 3,333 Rs. and the other defendants refused to discharge their shares. But the loan of 20,000 Rs. having been obtained on the credit of the plaintiff's father, Jugesur Mookerjea, son of Byjnath, served the plaintiff with a notice to pay through Mr.

1827.
amount.
Held that in
this case
the respon-
dents were
liable to
refund to
the appellee
the amount so
paid by
him, toge-
ther with
the charge
for the
notice and
this with-
out refer-
ence to the
fact whether
the amount
of the bond
was actual-
ly realized
by the ap-
pellant's
father or
not.

Wordsworth, an attorney of the Supreme Court, and was about to institute a suit against him for the same, when the plaintiff, through fear of disgrace and of being brought into the Supreme Court, paid down the money demanded, taking a receipt for the same. He therefore now sued for the recovery of it. The defendants Lukhee Narain Rai, Anund Lal Rai, Nund Lal Rai, and Mussummaun Hurreepria Munee, (mother and guardian of Mudhoe Soodun Rai and Gunga Narain Rai, minors), replied by denying that they had ever borrowed the sum of 20,000 Rs. from Byjnath Mookerjea or given it to the plaintiff's father, in consideration of his becoming their surety. They stated that the father of the plaintiff, having avowedly the welfare and benefit of the defendants at heart, caused a loan to be taken of 20,000 Rs. from Byjnath Mookerjea, on the security of Nundee Ram, Rughoonath and Hurchunder Sein, the agents of the defendants, with a view to defray the expences attendant on his becoming surety and acting as attorney in the case; that he also caused an engagement to be executed, containing several stipulations, but that after the decree of the Sudder Dewanny Adawlut had been executed, he acted in a manner wholly inconsistent with those stipulations, and had no object in view but the ruin and distress of the defendants; that he sowed dissension between them and Shama Pershad Nundee, from which individual he took another engagement, and, with a view to the subversion of the rights of the defendants, he presented both engagements to the Court of Sudder Dewanny Adawlut; that he sought by all the means in his power to reverse or alter the decree which had been passed in the defendants favour by the Court of Sudder Dewanny Adawlut and made no effort whatever to secure to them the arrears to which they were entitled; that he never paid them their dues with punctuality which induced them to contrive means of putting a stop to the appeal to His Majesty in Council, in order to effect which they consented to relinquish their right to nearly two lakhs of Rs.; that under these circumstances the plaintiff was not entitled to recover the sum claimed which was not given to his father in consideration of his being surety but in order to defray any expences which might be incurred by him in the capacity of surety or attorney during the time that the appeal might be pending before the King in Council.

The plaintiff in replication denied the plea of the defendants. He denied that his father had ever infringed the conditions contained in the engagement, dated the 16th of Sawan 1820 B. S., in which there was no condition requiring that there should be an actual decision by the King in Council; but that on the contrary it was expressly stipulated that in the event of the appeal being withdrawn by compromise between the parties, the plaintiff's father should not be called upon to refund any part of the sum he had received. The defendants in rejoinder urged that in the bond executed in favour of Byjnath Mookerjea there was the security given of the estate of the defendants and of their agents Nundeeram, Rughoonath and Hurchunder; that it contained no mention of the father of the plaintiff or of the loan having been obtained on his credit; that had the bond in question been authentic and had the sum specified in it been received by the defendants from Byjnath Moo-

Kerjea, either he or his son Jugesur would have demanded repayment from the defendants and their sureties and not, from the plaintiff, and lastly, that, if the plaintiff had preferred any other bond purporting to be for a loan obtained on the credit of his father and being other than the instrument above specified, he could have done so only with the view of injuring the defendants. The defendants Nundee Ram and Rughoonath made the same defence but Hurchunder Sein did not appear.

Domestic
Business
Letters
Nursa and
others.

On the 16th of January 1823, the Senior Judge of the Calcutta Court of Appeal, passed judgment in this case to the following effect. "It is admitted by both parties in this case that a security bond was executed and filed on the records of the Court of Sudder Dewanny Adawlut, and that 20,000 Rs. was the sum therein specified. But it appears from the tenor of the engagement executed by the defendants, that the above sum was not borrowed solely for the purpose of granting a consideration to the surety but for the purpose of defraving any expences that might be incurred in the discharge of the offices of attorney and surety. It is plain, however, that the father of the plaintiff contributed no labour in the capacity of attorney, inasmuch as the appeal was settled by private compromise, and, although there is no doubt of the fact that a bond was executed in favour of Byjnath Mookerjea for the sum of Rs. 20,000, yet, from all the circumstances of the case and especially from the evidence of the witnesses Moonshee Mohammad Punah and Anund Chunder Chutoorjea, whose testimony is acquiesced in by both parties, it is clear that the plaintiff's father caused the same to be executed, simply as a nominal transaction. It does not appear from the evidence of any one witness that the defendants received the money from Byjnath and paid it over to the father of the plaintiff in consideration of his becoming their surety and attorney. Besides it is inserted in the bond that the estate of the defendants is to be considered liable for the repayment of the loan and that Nundee Ram and the two others, are also responsible; but there is no mention made of the liability of the plaintiff's father as surety which should lead to his having been served with a notice by Jugesur or to his paying the amount demanded. Neither has the plaintiff in point of fact either proved that he was served with the notice or that he paid the demand; moreover the father of the plaintiff caused the bond in favour of Byjnath Mookerjea to be executed in a *fuzree* or substituted name, contrary to the provisions of regulation 7, 1799, and the circular order of the Court of Sudder Dewanny Adawlut, under date the 25th of July 1809. Under these circumstances the claim of the plaintiff is inadmissible." He therefore dismissed the plaintiff's claim with costs.

The appellant being dissatisfied with this decision appealed from it to the Court of Sudder Dewanny Adawlut. On the 18th of June 1827, the case came to a hearing *ex parte*, (the respondents not appearing after due notice served) before the Second Judge (C. Smith), who after putting certain questions to the *vakils* of the appellant recorded his opinion in the following terms. "It appears that the respondents, with a view to obtain the execution of the decrees of the Court of Sudder Dewanny Adawlut, passed on the 27th of May 1811, undertook, in conformity to that Court's order, dated the

1827. 15th of March 1813, to furnish security to the amount of 20,000 Rs. in the name of Radha Mohun Bunhoojea, father of the appellant and Kishen Mohun Bunhoojea. This security bond was executed on the 4th of *Bysakh* 1220 B. S., corresponding to the 5th of May 1813. It was filed in Court, on the 7th of May, of the same year, and, the security having been found to be good and sufficient, an order was issued on the 2d of August, for carrying into execution the decree of the Court. A detail of the conditions entered into between the respondents and Radha Mohun, on account of the security was contained in the engagement executed on the 16th of *Sawun* 1220 B. S. by Hureepria, the mother of the minor Anund Lal Chowtree, Nund Lal, Mudhoo Soodun, Gungaram and Lukhee Narain. It forms No. 20, of the file of the proceedings of the Court of Appeal. There was another engagement executed by Shamapershad Nundee, on the 20th of *Jeth* 1221 B. S., which Baboo Jugunath Singh and Moohummud Punah, *vakeels* of the said Shamapershad, acknowledged on the 2d of July 1814, to be a genuine and authentic instrument. It appears, also, from the proceeding of this Court, dated the 2d of July 1814, that the engagement executed on the 16th of *Sawun* 1220 B. S., contained twenty-one conditions and was filed in Court on that date by the *vakeels* of the obligors. The Court having approved its contents, an order was issued, on the 5th of July, of the same year, to the effect that as all the respondents had, in furtherance of the execution of the decree, consented that possession should be given to their surety Radha Mohun Bunhoojea, the Judge of zillah Midnapore should recognize that individual as the person authorized to exercise active interference in all matters relating to the estate. Afterwards, when, on the 23d of January 1816, the respondents preferred a complaint against the said Radha Mohun to the Court of Sudder Dewanny Adawlut, it was deemed unworthy of attention and in the proceeding containing its rejection, it was recorded that no act had been established against Radha Mohun, or his heirs, as having been done in contravention of the engagement, and, consequently, such as to annul its conditions, and, that the objections urged, especially the first, relative to the *owla*, and the sixth, relative to the bond for 20,000 Rs. executed in favour of Byjnath Mookerjea, for a debt willingly incurred by the respondent, as the consideration to Radha Mohun for becoming surety, were utterly futile. From the above circumstances it is abundantly evident that there is a sum of 20,000 Rs. due from the respondents in the former case, according to the security and agreeably to the conditions contained in the two engagements. In the fourth condition of the engagement, executed on the 16th of *Sawun* 1220, it is specified that, in the event of the appeal to England being in any manner adjusted or withdrawn in this country, neither the respondents nor their heirs would require from the appellant's father a refund of the sum of 20,000 Rs. which had been advanced to him in consideration of his becoming surety. It appears from the proceeding of the 10th of August, 1818, that the appeal was compromised seven years after the decision and five years after the execution of the engagement. This being the case it only remains to enquire whether the appellant or his father did or did not

actually receive the sum stipulated to be paid in consideration of the security. But the appellant admits that it was received. His statement is to this purport. "The respondents had no money wherewith all to pay the money promised by them to my father. Therefore my father procured a loan to be made to them by ^{Omachurna} _{Bunhojen,} Lukhee Narain and Byjnath for which a bond was executed on the 16th of *Sawun* 1220, ^{1827.} others. and the respondents made over the amount to my father, in consideration of his becoming surety;" now admitting that this statement is true, it is plain that the appellant can have no claim on the respondents, for the consideration of the security, which he admits that his father received. But in point of fact he has not sued on this account. He sues because the amount of the bond (the money having been obtained on the credit of his father) was repaid by the appellant, the respondents having failed to repay it on demand and the appellant having been consequently served with a notice by the attorney of the son of the obligee, for which he has the receipt of Mr. Wordsworth, the attorney in question. Although, viewing the case in all its bearings, it is possible that, in reality, no money was ever paid by Byjnath Mookerjea on the credit of Radha Mohun Bunhojea, and that the bond was executed in favour of Byjnath (who was the uncle of the appellant's father), with the view that whenever, according to the stipulation of the engagement, any money should be deposited in the hands of Radha Mohun he might be able by means of such bond to secure to himself a remuneration with interest for having become surety, still it has not been satisfactorily established to my mind that the bond was a mere nominal transaction. But whether it was merely a nominal bond or for a debt *bond fide* incurred, a large sum is unquestionably due from the respondents, because, supposing the bond to have been merely nominal, in that case, neither the plaintiff nor his father can be said to have received any thing on account of security, and if the bond was for a debt *bond fide* incurred, in that case, admitting that the plaintiff's father received a consideration for his becoming surety, still the respondents are liable for the amount of the debt which was borrowed for them on the credit of the plaintiff's father; and, in the event of their inability to pay, the sureties Nundee Ram, Rulgloonath and Hurchunder Sein are liable. That the bond should have been merely nominal rests on conjecture alone—but it is certain that in virtue of the bond or rather the receipt granted by the attorney of Jugesur Mookerjea for 23,238 ³ dated the 18th of November 1818, that sum is due from the respondents, as well as the sum of 20 Rs. charged for the notice. I am, therefore, of opinion that the respondents should be adjudged to pay that sum with all the costs of suit.

Subsequently to the delivery of this opinion certain of the respondents appeared and having appointed *vakeels* delivered in their replies to the pleas of appeal; but the Third Judge (C. T. Sealy) being satisfied, after a due deliberation of all the circumstances of the case, that the claim preferred by the appellant was just, concurred in the opinion expressed by the Second Judge. A final decree was consequently, on the 3d of October, passed in conformity thereto.

1827.

Nov. 13th.

GOKUL PERSHAD, Appellant,
versus
SUNSAREE MUL, Respondent.

In suit for money and property embezzled the Provincial Court adjudged payment of a third of the amount claimed to be made by one of the defendants as fine for his connivance, but on appeal preferred by him, the Court of Sudder Dewanny Adawlut reversed this order as being unwarranted by the regulations and inconsistent with the practice of the civil Courts.

"SUNSAREE Mul was the plaintiff in this case. He sued for the recovery of 12,101 Rs. on account of outstanding balances, also for the recovery of 10,100 Rs. in gold mohurs and one hundred and twenty Rs in silver; also for 250 Rs., on account of an ebony inkstand, shawls and handkerchiefs, also, for 2,250 Rs. on account of twelve ornaments as specified in the plaint. The total amount of money claimed was 24,821 Rs. and there was a further claim for the recovery of his ledgers and account books, extending from the year 1863 to the year 1879, *sumbut era*.

The claim was preferred in the Bareilly Provincial Court, on the 23d of June 1823, and the defendants were Guneshee Lal, Prubhoo Das and the appellant. It was set forth in the plaint, that, from the year 1863 to the year 1879, a mercantile establishment was carried on in the town of Bareilly, in the name of the plaintiff; that, in the year 1863, he constituted the defendant Guneshee Lal his *gomashtha*, and, secondly, in the year 1877, he employed the defendant Prubhoo Das, in the same capacity, their being thus entrusted generally with the management of the affairs of the concern; that during the periods of his indisposition, when the plaintiff was confined to his house, the ready money, bonds and all other descriptions of property, were confided to the care and custody of those individuals; that on the 2d of *Aghun* 1878, he committed to their charge his ready money and jewels, but that they betrayed their trust and conspiring together carried off the whole of the pipers and property belonging to the concern, to their own houses, and to that of Gokul Pershad the other defendant, and refused to deliver them up on demand; wherefore the plaintiff now sued for the amount above specified reserving his claim for other property until he should have ascertained the full particulars of the defalcation by reference to his account books yet in the defendants possession.

The defendants Guneshee Lal and Prubhoo Das alledged, in reply, that the former was nephew and the latter grandson of the plaintiff, who, by reason of his being childless sent for Prubhoo Das, from Allahabad, and, being at the time of sound disposing mind caused an entry to be made in the year 1878, in the book of that year, transferring the whole property realized and the outstanding balances of the concern from his own name to that of Prubhoo Das and his deceased son, Kalka Das. The amount so transferred was 24,101 Rs. to one-half of which sum the defendant was lawfully entitled; that the allegation of the plaintiff as to his having on the 2d of *Aghun* 1878, entrusted the care of his ready money and jewels, to the defendants was entirely false, inasmuch as the defendant, Guneshee Lal, was on that date, in Alignunge; and besides, had this been the case, the property so delivered would have been entered in the account books or there would have been some voucher of the delivery forthcoming; that as to his other claim of 12,101 Rs. the defendants were unable to reply, to it as there was no specification of the particulars of that claim or state-

ment as to how it originated; that the plaintiff's assertion as to his having constituted Prubhoo Das his *gomashtha*, in the year 1877, was absolutely false, as would be proved by reference to the account books, which contained no mention either of the date of appointment or amount of salary annexed to such office; that 1827.
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shad, v.
Sun saree
Mul. Prubhoo Das was the plaintiff's grandson, and, in virtue of that near relationship, was entitled to half his property and the fact that Prubhoo Das was not his *gomashtha*, might be proved by this circumstance, viz. when the plaintiff petitioned the Court to appoint Guneshee Lal, their treasurer, he named Prubhoo Das as the surety of that individual, and had Prubhoo Das been his *gomashtha* he would, unquestionably, have caused mention of that circumstance to be made in his petition and in the security bond; and, lastly, that the truth or falsehood of the plaintiff's statement as to the defendants having made away with the account books, from 1863 to 1879, would be apparent from an inspection of the ledger, for 1878, in which the accounts of all the former years were included. The third defendant in his reply contented himself by observing that the claim against him was founded in malice and fraud. He had been charged with receiving property made away with by the other defendants from whose reply, however, it would be perceived, that, in point of fact, no property had ever been made away with.

On the 12th of March 1824, the Senior Judge of the Bareilly Provincial Court gave judgment in this case in the following terms. The testimony of the witnesses adduced by the plaintiff is entitled to greater credit than that of the witnesses adduced by the defendants, for those of the latter are either their connexions or their dependants, while those of the former are wholly unconnected with him; independently of the discrepancies observable in the evidence of the witnesses for the defendants. The deposition of Lalla Tejrai a witness of the plaintiff who is proprietor of the banking house of Moolchund and Ramsuhai, and who is a highly trust worthy person, proves that Guneshee Lal and Prubhoo Das, seeing that their patron and benefactor, the plaintiff, was attacked by a severe illness conspired to embezzle his property, the fruit of his earnings for several years, which they carried off, together with all the vouchers, and books of the establishment; and, in conjunction with the third defendant, Gokul Pershad, secreted the whole in some place suggested by the latter individual. They made a false entry in the 1st page of the ledger without the knowledge and contrary to the inclination of the plaintiff, making all the outstanding balances amounting to 24,101 Rs. payable to Prubhoo Das and Kalka Das, and with a view to conceal their fraudulent practices they have either secreted or destroyed all the account books of the concern from the year 1863 to the year 1877. Certain arbitrators who were appointed to adjust the disputes between the parties have stated their inability to do so, in consequence of the accounts for past years not being forthcoming. The *vakeels* of both parties admit that there was no mention made of the ready money and jewels in the account book or ledger, which the defendants produced from their own house and presented to the inspection of the arbitrators. It is fair therefore to presume

1827. that it was the private property of the plaintiff and did not form any part of his mercantile concern. That the two defendants Guneshee Lal and Prubhoo Das, took from the house of the plaintiff a small box, containing gold mohurs and ornaments, as above stated, has been abundantly proved by the evidence of several witnesses, but the value of the ornaments has not been deposited to. Two hundred and fifty Rs. may therefore be deducted from the plaintiff's calculation, and the value of them assumed at 2,000 Rs. and allowing 10,000 Rs. as the value of the gold mohurs, a total of 12,000 Rs. is due from the defendants Guneshee Lal and Prubhoo Das to the plaintiff. As to the claim of the plaintiff for the sum of 12,101 Rs. on account of outstanding balances, it appears that the defendant, while the dispute was pending before arbitrators, submitted to them an account of the debit and credit sides of the plaintiff's banking concern. This account was drawn out in the Hindoo character, and extended from the 11th of Kartic 1878 to the 17th of Bhadoon 1880. In that the sum of 33,244 Rs. 6½ anas was entered to the credit side and the sum of 33,044 Rs. 3 anas to the debit side, leaving a balance in favour of the house of 200 Rs. This account was delivered in with two account books and a daily ledger now in Court, which were forwarded by the arbitrators, with a Persian translation. I am of opinion, that the defendants should restore to the plaintiff all the former account books of the concern, and that they should specify, within the period of three months, all the items of the expenditure specified in their account and that they should deliver up all the vouchers of the concern, and clear up the accounts to the plaintiff's satisfaction, or, in the event of their not doing so, that they should be forthwith compelled to pay to the plaintiff the sum claimed amounting to 12,101 Rs. As the connivance of Gokul Pershad, the third defendant, with the two others, and his intriguing and plotting with them have been clearly proved, it is proper that, with respect to him and as a punishment for his iniquitous conduct, an order to the following purport should issue. If the other two defendants shall not, as above ordered, within the space of three months, either pay to the defendant the sum of 24,101 Rs. on account of the ready money, jewels, and outstanding balances or shall not deliver up the account books and vouchers of former years, in that case the said Gokul Pershad shall pay to the plaintiff one-third of the amount decreed, that is to say, 8,033 Rs. 10 anas, 8 pie, such sum to be deducted from the amount adjudged against Guneshee Lal and Prubhoo Das, who, however, may be sued for it by Gokul Pershad. A decree to the above effect was passed accordingly and the defendants were made to pay all costs of suit.

Gokul Pershad, being dissatisfied with the above decision, appealed from it to the Court of Sudder Dewanny Adawlut. The case was first brought to a hearing before the Second Judge (C. Smith), on the 28th of May 1827. After duly weighing all the circumstances of the case he delivered his opinion to the following effect. "I am of opinion, that the substance of the decree of the Court below is sufficient to annul it as far as the appellant is concerned—because it is evident from that decision that if the property of the respondent was embezzled at all, the embezzlement must have

been practiced by Guneshee Lal and Prubhoo Das, the two defendants, who have not appealed to this Court and by them appropriated. The appropriation by the appellant, Gokul Pershad, is by no means proved and even admitting that his connivance was established, the award against him to pay the sum of 8,303 Rs. 10 anas, 8.^{1857.}
 pie, as a fine is not warranted by any regulation nor consistent with the practice of any Court of Justice. But, in point of fact, no connivance at all appears to have been proved in this case—I am, therefore, of opinion that the decree of the Provincial Court, as far as regards the appellant should be reversed, and that the costs in both Courts incurred by the appellant, be charged to the respondent." The Third Judge (C. T. Sealy), fully concurring in the above opinion, a final decree was passed accordingly.

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shad, v.
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Mul.

JOBA SINGH and others, Appellants,
versus
 MEER NUJEEB OOLLAH and others, Respondents.

THE respondents instituted this suit in the zillah Court of Tirhoot, against the appellants, on the 11th of March 1818, for the possession of one hundred and ten *beegahs*, fifteen *biswas* of land, claimed as *mokurrerees* and situated in Dyalpore, a *nizamut mehal*, comprised in pergunna Hajeeapore. The claim was laid at nine hundred and ninety-six Rs. twelve anas, being three times the annual produce, the produce of each *beegah* being estimated at three Rs.

The plaint was to the following effect. "In the year 1198 F. S., the entire *mouza* of Dyalpore was purchased by the plaintiff Nujeeb Oollah from Mr. Hurdis, and it was held by the said Nujeeb in his own possession and management, till the year 1201. In the year 1202, on account of a debt due to the house of Byjnath Sahoo, the *mouza* was assigned over to that individual who was one of the plaintiffs. In the year 1212, a two ana share of the *mouza* was sold by public auction, in liquidation of a claim of dower preferred by Doordana Khatoon, the mother of Nujeeb Oollah. This share was purchased by Lala Nitianund, who sold it to the plaintiff Birj Lal: afterwards in the year 1222, Byjnath Sahoo and Birj Lal, united in giving the whole *mouza* in farm for five years to Bhoopnaraian Singh, from whom they had regularly received the rents. But the defendants without any authority either from the plaintiffs or their lessee, had from the year 1222 to the year 1223, usurped the profits by force paying no rent for the same, and when the lessee of the plaintiffs had instituted against them, four different suits for arrears of rent they pleaded that their ancestors had obtained *mokurrerees pottahs* for the *mouza*, at the rate of 12 anas, per *beegah*. They produced in proof of their claim, *pottahs* purporting to have been

CASES IN THE SUDHER DEWANNE ADAWLT.

1827: granted by Mr. Hurdie and a letter stated to have been written by Meer Burkut Oollah, the father, of Nujeeb Oollah, confirming them in the possession of the *mokurrere* tenure. On the 30th of April, 1817, the Second Register of the zillah Court, passed an order with respect to one of the claims which related to the two ana share, disallowing the pottah set up by the defendants and adjudging them to pay rent at the rate of three Rs. per *beegah*, with reference to the rate of rent levied on adjacent lands; and as far as regarded the rest of the *mouza* and the three other claims, he directed the three plaintiffs to unite in the institution of a regular suit with a view to annul the *pottahs* alledged by the defendants to have been obtained by them. The property was originally acquired by the plaintiff Meer Nujeeb Oollah, in the year 1198, since which period no mention has ever been made of any *mokurrere pottah*. If there had been any truth in the defendants allegation, they would have taken care to obtain from the plaintiff Meer Nujeeb Oollah a confirmation of their right and they would have caused mention of it to be inserted in the *pottah* and *kubooleut* executed for the lease granted from the years 1217 to 1221 F. S., and which they took from the plaintiff Byjnath Sahoo. Besides the proprietor of a *nizamat* village is not competent to grant a *mokurrere pottah* of it in perpetuity, and moreover the alledged *pottahs* do not specify that the tenure is to endure generation after generation, and consequently the grant lapses on the death of those by whom it was acquired and does not devolve on their descendants,—according to the 16th and 18th sections of regulation 8, 1793, such tenure cannot be considered as hereditary. Under these circumstances the plaintiff sued and hoped for redress.

The defendants replied in the following terms. When Mr. Hurdie purchased the property from our ancestors he agreed to return to them the title deeds on receiving back the amount of the purchase money whenever he should return to Europe. For our support in the mean time he executed in favour of our ancestors three *mokurrere pottahs*, granting one hundred and ten *beegahs*, fifteen *biswas* of land, to our ancestors in perpetuity. They accordingly remained in quiet possession of the *mokurrere* lands so granted while that gentleman continued in the country. In 1198, when we heard of the sale of the *mouza* by that gentleman, we went to him and required back the title deeds as stipulated. He in reply told us that he had been obliged to dispose of the property to Meer Burkut Oolla, father of Meer Nujeeb Oolla, but that he would cause that individual—to confirm us in the *mokurrere pottah* which he had granted. In prosecution of this purpose he wrote to the Meer, who sent a reply containing the required confirmation, conveying at the same time to his *omla* authority for considering the lands as a perpetual tenure subject only to the stipulated quit rent. In conformity thereto the *omla* of the said Meer as well as Lala Nitaram and Birji Lal, after a two ana share of the property had been transferred to them, continued to receive the rent according to the fixed rate of the *mokurrere* tenure. In the year 1217 F. S., the plaintiff, first, by means of Bhoot Narsin, commenced demanding excess of rent, causing that individual to sue interplea.

suits against us for arrears of rent in the zillah Court. In one of those suits, as we neglected to file our title deeds, we were adjudged to pay rent for the two ana share, at the rate sued for by the plaintiffs and as to the rest we were permitted to hold it on the terms specified in the *pottah*. From the decree which gave judgment against us we appealed and the appeal is still under consideration. In short we are cultivators holding under grant from the original proprietor and the land in our cultivation is all *mokurrerees*, aggregably to the grant which was made for our support—and which the plaintiffs have no right to annul. The regulations quoted by the plaintiffs relate to *mokurreree* grants of the proprietary right to villages and not to *pottahs* for the purpose of cultivation. Proprietors of land were prohibited from granting *mokurreree pottahs*, subsequently to the year 1790, but the *pottahs* on which we rest our claim were granted antecedently to that year. The claim of the plaintiffs is therefore wantonly injurious.

On the 15th of July 1818, the register of the zillah Court gave judgment in this case. He was of opinion that the *pottahs* produced by the defendants even admitting that they were genuine instruments could not avail them agreeably to the 16th section of regulation 8, 1793, inasmuch as the grantees therein named had died and the grants contained no provision that the tenure should descend from generation to generation. The defendants on this ground he considered were not entitled to the perpetual tenure to which they laid claim. He therefore decreed that the *pottahs* in question should be held to be null and void, and that the defendants should pay rent according to the established rate for similar and adjacent lands, defraying also all costs of suit.

The defendants being dissatisfied with the above decision appealed from it to the Patna Provincial Court. On the 7th of May 1821, the Second Judge of that Court affirmed the decree of the register with costs, seeing no reason to interfere with the decision which appeared to him to be just and proper.

The defendants being still dissatisfied petitioned the Court of Sudder Dewanny Adawlut, to admit a special appeal which was ultimately admitted on the 14th of January 1823. Birj Lal was the only respondent who attended to answer the appeal. After a due deliberation of all the circumstances connected with this case, the Second Judge of the Sudder Dewanny Adawlut (C. Smith), recorded his opinion to the following effect. It appears that three *pottahs* were produced in the zillah Court, each of them, dated the 5th of the month of *Rajub* 1185. F. S. specifying that one *pottah* was granted to Runjeet Singh for forty-five *beegahs*, ten *biswas* of land, at a *jumma* of thirty-four Rs. two anas, one to Dhurp Singh for thirty-two *beegahs*, at a *jumma* of twenty-four Rs. and one to Lochuan Singh, for thirty-three *beegahs*, five *biswas*, at a *jumma* of twenty-four Rs. fifteen anas—total of land one hundred and ten *beegahs*, fifteen *biswas* and total of *jumma* eighty-three Rs. one ana. In this Court, besides the *pottahs* abovementioned, a Persian letter from Barkut Oolla has been produced, dated the 18th of August 1790, corresponding with the *Fuslee* year 1197; also a letter bearing the seal of Nujeeb Oolla, dated the 5th of *Shabaz*.

1827. 1200 F. S., and a letter from Colonel Alexander Hurdis, dated the 7th of August 1790, corresponding with the *Fuslee* year 1197. *v.* *Meer Nujeeb Ooilah* and others. The reasons assigned for the zillah decree are that admitting the *pottahs* to be genuine they cannot be upheld under the 16th section of regulation 8, 1793, owing to the decease of those persons who were named in the grant, and, from the circumstance of the term "generation after generation," not being specified, the *pottahs* on which the defendants rested their claim were on these grounds declared null and void—and they were placed on a level with other cultivators. There was no investigation made by the Courts below into the authenticity of the appellants exhibits nor was there any enquiry made as to the alledged possession of *Ranjeet Singh*, *Dhurp Singh* and *Lochun Singh*, the original *pottah-dars*, who obtained the *mokurrerees* grants as specified in the *pottahs* or as to the fact of whether or no the plaintiffs are the true and rightful heirs of those *pottah-dars*. If it should appear that *Ranjeet Singh*, *Dhurp Singh* and *Lochun Singh*, were in reality seized of the *mokurreree* lands, as specified in their *pottahs*, I am of opinion, that the tenure should be confirmed to their heirs—because in this case the provisions of section 16, regulation 8, 1793, do not apply, and it is perfectly certain that when the purchaser of the entire *mouza*, at the time of his disposing of it to a third person gave the original lessees of it a *mokurreree pottah*, the intent of both parties was that such *pottah* should confer a tenure in perpetuity to descend hereditarily from generation to generation. Nor can a title so acquired be lost by the transfer of the estate from one purchaser to another. For these reasons the Second Judge suspended passing a final order in the case and directed that all the exhibits above specified should be sent to the Court of Appeal with instructions that the Judges of that Court should make enquiry into and report upon the points above enumerated. The investigation ordered having been made accordingly and the required report having been received, the case was again brought before the Second Judge, on the 27th of October 1827, who recorded his final judgment to the following effect. "It has been satisfactorily proved by the appellants, that the lands claimed are theirs in virtue of a *mokurreree* tenure. It has also been proved that the tenure has been held at a perpetual quit rent ever since the time of its original acquisition by the original grantees and their heirs—the appellants. Under all the circumstances of the case, I am clearly of opinion, that the appellants are entitled to hold the lands at the invariable rate of rent specified in the *pottahs* and that the decrees of the Courts below should not be affirmed."

The Second Judge (A Ross), concurred in the above opinion, observing that although there might be some doubt as to the validity of the *pottah* granted by Mr. Hurdis, yet as the appellants and their ancestors had had possession of the land at a fixed invariable rent for so long a time, the respondents could not now be considered at liberty to demand any larger amount as rent than what they had been hitherto accustomed to receive. A final decree to the above effect was passed accordingly, on the 29th of November 1827.

BABOO BYJNATH SAHOO, Appellant,
versus
 GOVERNMENT, Respondent.

THE appellant was formerly plaintiff in this case. He brought his action, on the 22d of June 1824, in the Patna Provincial Court, against the Collector of Tirhoot, to recover possession of a *mokurrere istimraree* tenure, consisting of Dyalpore and nine other *mouzas*, situated in perganna Hajeeppore zillah Tirhoot, and to set aside the orders of the Collector and the Board of Revenue, for fixing a new assessment, according to the actual produce under the provisions of regulation 2, 1819. The claim was laid at 1,253 Rs. 9½ anas, being the annual profits after deducting the sum of 90 Rs. expence of management, 124 Rs. as *malikana* and 333 Rs. 6½ anas, as the *mokurreree rent*; the gross produce being 1,801 Rs.

The plaint was in substance as follows. In the year 1184 F. S., Colonel Hurdis purchased the whole of the *mouzas* in question, from the former *maliks* Siumber Singh and others. In the year 1186, Rai Sadhu Ram, the *dewan* of the Soobah and superintendent of the perganna, seeing that the rent levied on the estate was excessive with reference to the profits yielded after deducting as *nankar* the sum of 104 Rs. 10 anas, from the former *jumma* of 138 Rs. ½ an ana, gave to the aforesaid Colonel, a *mokurreree sunnud* for the property fixing the rent in perpetuity, at 333 Rs. 6½ anas, which grant was confirmed by a *pottah* from Fyzolla Khan, the *aumil* of the perganna. Both these instruments bore the seal of the respective grantors. In the year 1196 F. S. the Collector, in confirmation of the *mokurreree tenure*, issued his *sunnud*, bearing date the 28th of May 1789, corresponding with the 8th of Jeth 1196 F. S. He also issued a *perwanna* to the same effect to Meer Burkut Oolla the superintendent of the perganna. In the year 1197 F. S. at the time of the perpetual settlement, the gentlemen entrusted with the formation of it, finding that the actual produce of the estate was not more than proportionate to the *jumma* assessed upon it, confirmed to the Colonel the *mokurreree istimraree* tenure which he had obtained. The book, containing the particulars of the perpetual settlement was forwarded to the Supreme Council, and the arrangements therein made were approved and sanctioned by the Governor General in Council. Proclamation was accordingly issued, confirming the settlement made which was declared to be perpetual and to endure from generation to generation. The Colonel kept possession of the estate, till the year 1197 F. S. paying the fixed rent with which it had been assessed. In the year 1198, he sold the whole of the *mokurreree* property together with the *nankar* to Meer Nujeeb Oolla Khan, for the sum of 2,500 Rs. The bill of sale bore his signature and was dated the 12th of Shawal 1204. A. H. the purchaser at the same time receiving all the former title deeds. The aforesaid Meer invariably paid the quit rent assessed, receiving in return the authenticated receipts of the Collector for the same. In the year 1216 F. S. a two ana share of the property in question, was sold by public auction, in satisfaction of a demand of dower preferred by Doordana Khatoon,

1827. the mother of Nujeeb Oolla. That share was purchased by Lalla Nitianund, who, in the year 1217, sold it to the plaintiff for 2,200 Baboo Byj-nath Shoo, v. Govern-Rs. and in the year 1225 F. S: Meer Nujeeb Oolla, sold the remaining portion or fourteen anas to the plaintiff, also, for the sum of 22,501 Rs. The purchases were negotiated by the *gomashta* of the plaintiff named Birj Lal. In virtue of his purchase, the plaintiff became possessed of the entire estate, paying *annually* the fixed *mokurrerees jumma* of 333 Rs. 6½ anas. But in the year 1818, A. D. the Collector served the plaintiff with a notice requiring him to produce his title deeds, in virtue of which he claimed to hold the property at a *mokurrerees sunnuds*. The deeds of sale, the *mokurrerees sunnuds* and the receipts for rent were produced accordingly, but to these no attention was paid, and in a proceeding, dated the 14th of May 1822, the Collector declared his opinion that the lands in question, were liable to resumption and subject to a new assessment to be imposed with reference to the actual produce. The papers in the case were then forwarded to the Board of Revenue, by whom it was determined in the first instance, on the 19th of March 1824, that the tenure was liable to resumption but that the present incumbents were entitled to hold it at the same *jumma*, during their natural lives. For a confirmation of their opinion they submitted their proceedings to the Governor General in Council, by which authority it was declared that the original order of the Collector was just and proper, and that a new assessment should forthwith be made. But in point of fact, the lands in question, are not liable to resumption agreeably to the rules contained in sections 76 and 74, regulation 8, 1793, they having been held at one invariable quit rent for a period of twelve years prior to the decennial settlement; as well as by section 17, of the same enactment, the *mokurrerees sunnud* having been confirmed, first, by the gentlemen entrusted with the formation of the perpetual settlement, and, secondly, by the Governor General in Council, and the rent having been ever since received without any objection, at the rate then imposed. The plaintiff purchased the estate for a large sum of money on the faith of the assurance contained in regulation 1, 1793. Under these circumstances the plaintiff expressed his hope that the grievance of which he complained might be redressed.

The Collector in reply urged, that the documents now adduced by the plaintiff, in support of the claim to hold the lands, as a *mokurrerees* tenure had been rejected at the time the original investigation was held, to determine the question of resumption, on which occasion the order of the Collector was ultimately affirmed by Government; that the lands were clearly liable to resumption and that the plaintiff's attempt to prove the contrary by relying on title deeds, which had been already rejected, could not be entertained for a moment and that as the whole of his allegations had been already amply refuted, there was no necessity for entering into any further argument on the present occasion.

On the 11th of June 1825, the Fourth Judge of the Patna Provincial Court, passed judgment to the following effect. The claim of the plaintiff rests on two grounds. First, the *mokurrerees sunnud*, bearing the seal of Rai Sadhu Ram and dated the 29th of Shawal 1186 F. S., the *pottah* of the same date, bearing the seal of Fyzulla Khan,

the *amul* of the perguna, and the *mokurreree sunnud*, bearing date the 28th of May 1789, A. D. containing a confirmation of the assessment in perpetuity in favor of Colonel Hurdis and two *perwannas* directed to Burkut Oolla Khan, dated the 18th of May, of the same year, and, secondly, the fact of rent having been received at one meat.

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invariable rate of 333 Rs. 6½ *anas*, *per annum*, for a period of twelve years, antecedent to the decennial settlement; which took place, in the year 1197 F. S. But it would appear that from the commencement of the year 1186 F. S. to the end of the year 1196, there is only an interval of eleven years, and the *vakeels* of the plaintiff admit that they have no *sunnud* for the lands, under the seal of the Governor General in Council. Under these circumstances the *sunnud* granted by the Collector and by the *amuls* of the perguna cannot be held to have any validity. The orders of the Collector and of the Board of Revenue for the central Provinces declaring the lands liable to resumption and subject to a new assessment, appear to be in every respect just and proper. On the above grounds the Fourth Judge dismissed the claim of the plaintiff with costs. The plaintiff being dissatisfied with the above decree, preferred an appeal from it to the Court of Sudder Dewanny Adawlut, laying his claim at 1,000 Rs. 3½ *anas*, being three times the amount of the *mokurreree jumma*. On the 2d of September 1826, the case was brought to a hearing before the Second Judge (C. Smith), in the presence of the *vakeels* of the parties and having been on that day postponed, was again brought forward, on the 11th of the same month, before the same Judge, who recorded his final opinion in the following terms. "It appears to me, that the decree of the Court below cannot be affirmed, because there exists the strongest probability, judging from all the circumstances of the case, that at the time of the decennial settlement, Dyalpore the *mouza* in question, was registered as a *mokurreree* tenure, not so much from the fact of the *sunnud* granted by Sadhoo Ram and the *perwanna* of the Collector, as with reference to the fact that the property in question, could not with propriety bear a heavier assessment. The report of that settlement, together with that for the other *meahs* settled in the district of Tirhoot, was duly forwarded to the presidency. If the word *mokurreree* was retained in the Government registry books, the fact can excite no surprise inasmuch as the whole of Soobah Behar was assessed, at a *mokurreree jumma*. But the terms *mokurreree* and perpetual settlement are synonymous. It is also evident, that in the year 1216 F. S. a two *ana* share of the *mouza*, in question, was sold by public auction, under the superintendance of the Collector and the sanction of the Board of Revenue, when the former assessment for that portion was retained. In the year 1225 F. S. the plaintiff made the purchase of the estate for a heavy sum relying on the faith of the perpetual settlement and on the accuracy of the public registry books. The consideration paid by him for the fourteen *ana* share, which was purchased by his *gomashta* Birji Lal, amounted to 22,500 Rs. Besides, admitting that the *mouza* of Dyalpore is legally subject to a new assessment, still I am of opinion, that the decision of the Court below should be amended, because in this case there is a difference of opinion between the Board of Revenue

1827. and the Government, the opinion of the former authorities being that the present incumbents should retain possession of the tenure, at a *mokurree jumma*, during their natural lives and that the new settlement should not be carried into effect, until after their death, whereas the order of Government was to the effect that the lands should be immediately resumed and reassessed, even during the lives of the present incumbents. But in the 21 section of regulation 2, 1819, reference is only made to the decision of the Board, and no mention is made of any decision of the Governor General in Council. The Board of Revenue were apparently the proper authority to issue a final order according to their own discretion nor is there any prohibition against their so doing to be found in the enactment above cited. It is evident that in this case, the Government is a party and that the Members of the Board of Revenue were officiating in the capacity of Judges. Their authority should therefore in this case be considered as tantamount to Judicial Authority. Viewing the matter in this light, it is that the ultimate decision of the Board of Revenue is considered as a judgment of the first resort and the decree of the Judicial Authorities as a judgment in the second resort, so that every decision by the Board of Revenue, is open to a regular appeal as a matter of right without the necessity of shewing special cause for its admission; such a thing was never seen or heard of in the annals of Jurisprudence as that the Judge in a cause should take the plaintiff's opinion on its merits and having ascertained his pleasure should recede from his own judgment and ultimately decide the case according to the judgment of the plaintiff. A person so acting could not be considered as a Judge between the parties but as the servant of the plaintiff alone. In this case, there is no necessity for insisting upon it that *nolens volens*, the settlement of the *mouza* with reference to its actual produce shall be immediately carried into effect—because the *mokurreree-dar* is not devoid of proprietary right. He is proprietor of the *mokurreree* and of the proprietary right which constituted his purchase and any new settlement must be made with him agreeably to the regulations. Under these circumstances, I am of opinion, that the decisions of the Revenue Authorities and of the Patna Provincial Court, should be reversed and that the appellant should be reinstated in the possession of *mouza* Dyalpore, as a *mokurreree* tenure, subject only to the fixed assessment of 333 Rs. 6½ anas, as the *annual* rent and that Government should defray all costs of suit."

On the 29th of November 1827, the case came to a hearing before the Fifth Judge (A. Ross,) who recorded his opinion in the following terms. "It appears that Mr. Hurdis purchased the *talook* in question, in the year 1184 F. S., and that Sadhu Ram, the *dewan*, of Soobah Behar and superintendent of *pergunna* Hajepore, in which Dyalpore is situated, considering the former assessment of 438 Rs. ½ an ana excessive, having deducted 104 Rs. 10 anas, as *walikang* assessed the estate with a *mokurreree jumma* of 333 Rs. 6½ anas. This took place on the 29th of Shawul 1186 F. S. on which date he issued a *sunnud* to that effect in favour of Mr. Hurdis. The Collector of Tirhoot confirmed the assessment so made, first, in 1189 F. S. and, secondly,

in 1196, when he issued *perwannas*, under his official seal and signature to the Chowdhrees and *canooongoes* of his district directing them to consider the same in full force. At the period of the decennial settlement, in 1197 F. S. the *mouza* in question, was assessed at the same *jumma* and that settlement was confirmed by the Governor General in Council at the time. Afterwards Mr. Hurdis sold the estate, in 1198 F. S. to Meer Nujeeb Oolla, for the sum of 2,500 Rs. and in 1216 F. S. a two ana portion of it was sold in satisfaction of a decree of Court. Of that portion Nitianund became the purchaser and he sold it again to Byjnath Sahoo, in 1217, for the sum of 2,200 Rs. Afterwards in the year 1225, the appellant purchased the remaining fourteen ana portion of the *mouza* for 22,500 Rs. in the name of his *gomashtha* Birj Lal, from the proprietor Nujeeb Oolla. During all this long interval that is to say from the year 1197 F. S. up to the period of the purchase of the fourteen ana share, which comprises nearly eight and twenty years, there has never been any question or objection raised by the officers of Government, as to the validity of the *mokurreree* assessment. Notwithstanding all this, the Collector of the present day, in the year 1822, solely on the ground that Sadhoo Ram had no authority to grant a *mokurgerge* tenure, declared his opinion that the settlement made in 1197 F. S. should be reversed under the provisions of regulation 2, 1819. That opinion was maintained as being correct by the Board of Revenue in the central Provinces and by the Government. I am of opinion, that the decisions of the Revenue Authorities and of the Court below are improper and should be reversed. It is evident that the Collector, at the time of making the decennial settlement which is perpetual, was perfectly aware that Rai Sadhoo Ram had no authority to grant a *mokurreree sunnud*, yet the perpetual assessment fixed by that individual was affirmed, from which fact it may with the strongest degree of probability be inferred that the settlement of the *mouza* in question was made with reference to its capabilities and that such settlement was on the same ground confirmed by the Governor General in Council at the time. I am of opinion, therefore, that it would be inconsistent with the principles of equity and justice to annul the settlement of 1197 F. S. on the plea of the insufficiency of the grant made by Rai Sadhoo Ram, which insufficiency must have been palpable and notorious at the time of the formation of the decennial settlement; nor would such a proceeding be consonant to the intent or *ary* of the regulations of Government." On these grounds the Fifth Judge concurred in the order proposed to be passed by his colleague Mr. Smith and judgment was accordingly given in favour of the appellant with costs.

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CHUTTER SINGH, Appellant,
 versus
 MUSSUMMAUT NOORUN, Respondent.

The heirs being a widow, a son and two daughters, the property should according to the Moomummudan law be made into thirty-two parts, of which the widow is entitled to four, the son to fourteen, and the daughters, to seven each.

THE respondent brought this suit in *formā pauperis*, against Syud Kamal Ali and the appellant, in the Patna Provincial Court, on the 18th of May 1822. She claimed possession of one quarter of mouza Moosapore Mungrahée, an *ayma* tenure, in parganna Hajepore, and a quarter of mouza Kaundoo Chupra Ghouspore, also an *ayma* tenure in parganna Kurkee zillah Tirhoot. The claim was laid at 5,620 Rs. eighteen times the *annual* produce. The plaint set forth that Syud Shah Ghous Ali had one son named Syud Rookun Oodeen and two daughters, one of whom was named Khuderun, and the other was the plaintiff. He had no other heirs. His landed property consisted, at his death, of a half share of each of the abovenamed mousas. That property, however, was absorbed in satisfaction of the dower of his widow. Syud Rookun Oodeen, proceeded on a pilgrimage to Mecca, on the 7th of the month of *Rujub* 1195 F. S. since which period he had not been heard of: consequently the plaintiff and Khuderun were the only two existing lawful heirs to the property of the deceased and his widow, to a moiety of which they were each entitled and jointly took possession accordingly. In the year 1212 F. S. Meer Syud Moomummud, the husband of Khuderun took a farm of the plaintiff's share in the name of his son Syud Kamal Ali at a yearly *jumma* of 110 Rs. for the period of ten years, commencing from the year 1212 F. S. and ending with 1221 F. S. and, having paid the entire rent due for that time, went on a journey to the eastward in 1222, and as the parties were living in coparcenary, and the plaintiff's son Syud Shah Ameer Ali had not arrived at years of discretion, the said Syud Kamal Ali became *mohktar* in the management of the property and paid the plaintiff, according to the accounts, the sum of 175 Rs. *annually*, from the beginning of 1223 up to 1228 F. S. The plaintiff instituted this suit, because, when her son arrived at years of discretion, the defendant Syud Kamal Ali took possession of mouza Moosapore Mangrahée and having put Chutter Singh in possession of mouza Ghouspore refused to come to any adjustment of the accounts.

The defendant Kamal Ali denied the plaintiff's claim to the moiety of the property of Shah Ghous Ali, in virtue of his leaving one son Rookun Oodeen and two daughters Mussumaut Khaderun and the plaintiff and of its being divided into four equal shares. He stated, that the plaintiff never had been seized of any of the villages, but, from the time of the death of her father, only received her maintenance, and from the year 1198 F. S., a monthly allowance of 15 Rs. was made to her up to the year 1208. When the defendant lost possession, of the six ana share of mouza Mabil and some diminution in the plaintiff's allowance took place, she, at the instigation of certain evil disposed persons, was about to institute a suit for the partition of her share, and the defendant's father Meer Syud Moomummud, fearing that the family would be disgraced by the exposure, executed an engagement in the name of

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the defendant Kamal Ali undertaking to pay the plaintiff ten Rs. *annually*, which the defendant in consequence regularly discharged. The present state of the *mouza* in question, the defendant stated to be as follows. Moesapore Mungrahes was let to certain merchants in virtue of some engagements which had been contracted, one of which leases was executed by Syud Ameen Ali, the plaintiff's son, as well as by the defendant. The whole of the money paid in advance on account of the rents by Sheikh Anwar Ali and the other merchants, was made over to Shah Waris Ali, the full brother of Shah Ghous Ali, and, up to that day, his heirs had never returned a farthing; on which account the plaintiff had never received any of the money so advanced. The twelve ana share of *mouza* Kaundoo Chupra, was mortgaged by the defendant's father, for the sum of 1,201 Rs. to Bhola Thakoor, in the name of the defendant on certain conditions. By means of the money raised on the mortgage, the debt due by Waris Ali to Rapp Niwaz Dobe, Bolakes Lal and other merchants was discharged, and the title deeds recovered. Chutter Singh undertook to satisfy Bhola Thakoor's demand, provided he were allowed possession of the property for twenty years, with a view to reimburse himself by means of the proceeds. This was agreed to by all the parties concerned and an engagement executed accordingly, in virtue of which Chutter Singh was still in possession. The plaintiff herself executed an *ikrarnama* binding herself not to demand her share until the whole of the debt due to the merchants had been realized, and agreeing to remain satisfied with the allowance of ten Rs. *annually*, until the estate should be disencumbered. The documents connected with this transaction being in the defendant's father's possession, and he having died on a journey to the eastward are not forthcoming. Syud Rookun Oodeen, upon his departure, executed an instrument appointing the defendant's father his *mohktar* in virtue of which, the defendant, and before him his father, had been seized of the said property from the years 1195 till 1223 F. S., and, although Syud Rookun Oodeen had not been heard of for thirty-six years, it was not impossible that he might return and demand his share from the defendant. Seeing therefore that the plaintiff had executed the above *ikrarnama*, and that the defendant is Syud Rookun Oodeen's *mohktar*, the plaintiff could not lay claim to her share until the creditors were satisfied and the estate disencumbered. Whatever balance of the plaintiff's allowance might be due from the defendant, he was prepared to pay by instalments.

The other defendant Chutter Singh suffered judgment to go by default. When the case came to a hearing, on the 16th of July 1823, the Third Judge of the Patna Court observed, that, although the defendant allowed the plaintiff's title, he defended himself by saying that in the event of Rookun Oodeen's return he would be held responsible for his share; but, the Third Judge remarked, that in the event of that individual's not returning, his share would be liable to partition into equal shares among the parties, and that the defendant and his father had no power, in consequence of the agreement executed by Kamal Ali, to let or mortgage the plaintiff's share to any one.

1827. **Chutter Singh, v. Mussummaut Noor-un-nisa.** On these grounds it was ordered that the plaintiff should be put into possession of the whole of her share derived to her from her father Shah Ghous Ali, in virtue of inheritance; and of the half of Rookun Oodeen's share, on condition of her undertaking to give up the said share in the event of Rookun Oodeen's returning and demanding his property—costs were made payable by the defendant Kamal Ali.

Chutter Singh not being satisfied with this decree appealed to the Court of Sudder Dewanny Adawlut, laying his claim at 2,808 Rs. eighteen times the produce of *mouza* Kaundoo Chupra. He denied that he held the property as mortgagee, alledging that Kamal Ali, in 1212 F. S. sold the twelve ana share of the *mouza* in question to Bhola Thakoor, for 1,200 Rs., on his own part and as agent for Beebee Ruhmanee, the mother of the plaintiff, and executed an acknowledgment which he gave to the said Thakoor under his own seal and signature and witnessed by Syud Moohummud, the husband of Mussummaut Khuderun, the half sister of the plaintiff, attested by the seal of the *Cazee* and other respectable witnesses; that when the purchaser arrived, together with the *mokhtar* of the sellers, at Moozafferpore, the appellant first became informed of the sale of the said share and opposed it on the grounds of his acknowledged right of pre-emption, which right, the purchaser allowing, put him in possession of the said share on his payment of the purchase money and delivered into his possession the whole of the title deeds; that in virtue of these documents he had been seized of the property in question, from the year 1212 F. S., which fact the *gomashtha*, *putwari* and other inhabitants of the *mouza* could certify; that the said *mouza* was absorbed in satisfaction of the dower of Mussummaut Beebee Ruhmanee; that she during her life time sold the same with the consent of the other sharers and that neither the plaintiff nor any of the other heirs had any claim to it. The respondent not appearing after due notice the case was brought to a hearing before (Mr. C. Smith), Second Judge of the Court, during her absence, on the 19th of May 1827, who recorded his opinion to the following effect.

"There is no mention made of the dower of Mussummaut Ruhmanee, the respondents mother, in any of the documents filed by the appellant; nor is that statement at all authenticated. On the contrary it appears from the deed of sale, executed by Kamal Ali, in favor of Bhola Thakoor, and the receipt dated the 15th of Zeshij 1219, A. H. that the property of Shah Ghous Ali could not have been absorbed in satisfaction of his widow's dower, as mention is made of the share of Khuderun (the plaintiff's sister), as well as of that of the said Mussummaut Ruhmanee in both the above documents. Since therefore the other heirs obtained shares, it cannot be admitted that the property was absorbed in satisfaction of dower. It appears that Shah Ghous Ali dying, left his widow Mussummaut Ruhmanee and the respondent, his daughter; and another daughter, Mussummaut Khuderun, the mother of Kamal Ali, also a son Rookun Oodeen; in which case the eighth share of her husband's property would descend by inheritance to Mussummaut Ruhmanee and the said Mussummaut Ruhmanee."

and Kamal Ali had not the power of selling the share of Rookun Oodeen who is missing. The sale therefore of the twelve ana share of mouza Kaundoo Chupra, cannot be held to be valid except so far as relates to the shares of Mussummaut Ruhmanee and Khuderun (which had descended to her son Kamal Ali), but Rookun Oodeen's share is not involved in this suit. Mussummaut Ruhmanee's share which was sold during her life time cannot descend by inheritance to any one, but belongs to the purchaser. On these grounds, I am of opinion, that the decree of the Patna Court should be affirmed respecting the four ana share of mouza Moosapore Mungrahjee pergunna Hajypore, and also, respecting a four ana share of Kaundoo Chupra, the remaining twelve ana share of which should be divided into thirty-two parts and distributed as follows. Four parts being the original share of Mussummaut Ruhmanee, and seven parts being that of Mussummaut Khuderun, making a total of eleven parts to be awarded to Chutter Singh, together with seven parts of Rookun Oodeen's share to be held by him until the appearance of that individual or its being claimed by his heirs, and the remaining fourteen parts to be awarded to the respondent; seven in right of her share as daughter and the other seven in succession to her missing brother Rookun Oodeen." The Third Judge C. T. Sealy, coinciding in the above opinion, a final decree was passed accordingly.

MUSSUMMAUT SHUMSOONISA, widow of FYZ ALIKHAN, 1827.
Appellant,
versus
MEER GOUHUR ALI, MEER SAADUT ALI and MEER NUJABUT ALI, Respondents.

Nov. 27th.

IN this case the respondents were the original plaintiffs. They sued to recover an half ana share of a certain zemindaree, situated to the Moon in pergunna Atea and other pergunnas, in the possession of Fyz Ali Khan and which had formerly been the property of Khoda Nuwaz Khan. The suit was brought in the zillah Court of Mymunsingh, on the 26th of August 1818, and the claim laid at 5,106 Rs. The guardian of Fyz Ali Khan was the original defendant. The claim set forth that Khoda Nuwaz Khan, the proprietor of the estate in dispute, married the maternal aunt of the plaintiffs, who, after the death of her husband, continued jointly with the other heirs to enjoy the produce of the property, and, after its attachment, continued to receive a monthly allowance out of the proceeds, until the year 1232, when she died; that by the Mookumudan law, an half ana share of the property in question, belonged to the aunt of the plaintiffs, as widow, to which portion they (the plaintiffs) were entitled to succeed on her death; that the other heirs had taken

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Chutter Singh, v. Mussummaut Neerun.

cannot leave the gully have four wives living at the same time; and the fact of a woman's having suffered 42 years to elapse since the death of her alleged husband.

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band, without advancing any claim, although many suits had been brought in this interval by the other heirs, was held to furnish strong presumption that she was not lawfully married to him.

their just allotments, but that the share to which they (the plaintiffs) were entitled to succeed had been made over to Fyz Ali Khan who enjoyed a five ana share and whom they now sued through his guardian (Ram Chunder Chatoorjea), he being a minor and subject to the authority of the Court of Wards.

Ram Chunder Chatoorjea, in reply, urged that the claim of the plaintiffs should have been advanced against all the heirs and that their singling out one of them was inadmissible; that Khoda Nuwaz Khan had seven wives—the first Zeeba Khanum, the second Bhanggea Khanum, both of whom died before him—the third Shohzadee Khanum, by whom he had three sons, viz. Alif Khan, Gholam Heesin Khan and Khoda Yar Khan—the fourth Subree Khanum, by whom he had one son, Imam Buksh—the fifth Kheirun Khanum—the sixth Durea Khanum and the seventh Aina Khanum, of whom the plaintiffs had made mention; that as, according to the Moohummudan law, it was not admissible to contract a fifth marriage (four wives being alive) the plaintiffs were not entitled to any right of succession to Aina Khanum; that accordingly, ever since the death of Khoda Nuwaz, which took place, in the Bengal year 1180 B. S., a period of forty years since, no claim had ever been advanced on the part of Aina Khanum or the plaintiffs; that moreover the entire property of Khoda Nuwaz devolved on his son Alif Khan, who, held it till the year 1210, when he died, and it then devolved on his son Fyz Ali, the minor defendant, in whose possession it had remained for fifteen years before any claim regarding the recovery of it had been instituted; that the present claim was therefore barred by the operation of section 4, regulation 3, 1793, and also, by clause 3, section 3, regulation 2, 1805, and lastly, that the fact of Aina Khanum having received a small monthly allowance for her support, so far from proving that she had any right of inheritance, furnished a strong argument against the existence of such right, as she would not have surrendered a legal claim in exchange for an uncertain pittance.

The plaintiffs rejoined that with the exception of a two ana portion, which by a compromise they resigned to one of the heirs named Khaja Ali Khan, Alif Khan had retained in his own possession the shares appertaining to all the rest of the heirs; that many of the other heirs had sued him and recovered their rights and that all the property of which he took possession, (among which was the share of Aina Khanum) had devolved on his son Fyz Ali, who was therefore alone sued; that, besides, the Moohummudan law prohibited the marrying of more than four wives, only in case all four are living; that the aunt of the plaintiffs was the fourth wife and that she had retained possession of the property, until the Bengal year 1222, to which facts the plaintiffs were ready to produce proof. Thakoor Das Bunhoojea (who had in this interval succeeded Ram Chunder Chatoorjea, in the guardianship of the minor), gave in a replication to the effect that Aina Khanum was the seventh wife espoused by Khoda Nuwaz; that he had married her on the supposition that she was the daughter of a Moghul but that, subsequently discovering that her father was a Syud, he had divorced her immediately. At this stage of the proceeding a third person intervened by name Meer Hyder Ali. He

presented a petition, stating that Aina Khanum and Khudeeja Khanum, were full sisters and daughters of one 'Aga Salib Koonjeree, an inhabitant of the city of Dacca; that Meer Fuzl Ali, the father of the petitioner, was the son of Khudeeja Khanum, who was the elder wife of Meer Moohummud Ali and that Meer Gohur Ali and the other plaintiffs, were the sons of Jumeela Khanum, the younger wife of the same individual; that Jumeela Khanum, the mother of the plaintiffs, was not the sister of Aina Khanum, and that the plaintiffs, consequently, were not the heirs of Aina Khanum, whose property should devolve on the petitioner. On the 27th of April 1822, the Judge of the zillah Court gave judgment in favor of the plaintiffs, thinking it proved by the evidence adduced by them that Aina Khanum was the fourth wife of Khoda Nuwaz; that she had all along enjoyed a portion of his property as such, and had received a regular monthly allowance, from the Collector's office, and, not crediting the allegations advanced by the defendant which he did not consider sufficiently substantiated. He observed, at the same time, that as the defendant did not dispute as to the quantity of the property claimed, but objected only to the claim itself, there was no necessity to take the opinion of the law officer on that point. The petitioner Meer Hyder Ali was directed to proceed in conformity with the provisions laid down in regulation 4, 1793, and informed that his claim would not be affected by the decision in the present case. The guardian of the minor being dissatisfied with this decision appealed from it to the Dacca Court of Appeal, the Senior Judge of which Court, after taking a *futwa* from the law officer of the city, to the effect that the witnesses of the respondents were entitled to greater credit than those adduced by the appellant, gave judgment dismissing the appeal, on the 3d of March 1823, observing that the tenor of the *futwa* of the law officer corresponded with the substance of the decree of the zillah Judge. Costs were made payable by the appellant.

The guardian of the minor being still dissatisfied presented a petition to the Court of Sudder Dewanny Adawlut, for the admission of a special appeal, which was complied with on the following grounds. Four cases had already been decided in the Court of Sudder Dewanny Adawlut, in which the claims of the heirs of Khoda Nuwaz had been agitated. In those cases there was no mention made of Aina Khanum as the wife of that individual and there was a doubt as to her standing legally in that relation. The taking an opinion from the law officer of the city Court, in this case appeared contrary to the intent and meaning of section 16, regulation 4, 1793, and the reasoning contained in that opinion relative to the credibility of witnesses could not be received in the present day or justified by any rule in the existing regulations. In the interval between the admission of the special appeal and the bringing forward of the case, Fyz Ali had come of age and had subsequently died. He was succeeded in the appeal by his widow Shumeesonisa.

On the 16th of July 1827, the Second Judge of the Sudder Dewanny Adawlut (C. Smith), gave his judgment in the following terms. "I am of opinion that the fact of Aina Khanum's

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having been the lawful wife of Khoda Nuwaz, so as to entitle her to succeed to him as heir has not been sufficiently proved. The fact cannot be considered to be established from the witnesses adduced by the respondents. Investigations have been made relative to the family of Khoda Nuwaz repeatedly in suits connected with the succession to the property of that individual and yet has there never been any mention made of Aina Khanum as his wife. The circumstance alledged of her having received part of the profits and allowances in money cannot be held to prove her marriage, and, admitting, that Aina Khanum was the lawful wife of Khoda Nuwaz, it still remains very doubtful whether the respondents are her heirs. An individual named Hyder Ali who is apparently the grandson of Khudeeja Khanum, the sister of Aina Khanum, has represented that though the said Khudeeja was the wife of Moohunimud Ali, father of the respondents, yet that she was not the mother of the respondents, who were sons of Mussum-maut Jumeela, the junior wife of that individual. The respondents witnesses who have deposed otherwise cannot be trusted. This, at all events, is clear that Aina Khanum was living for forty-two years after the death of Khoda Nuwaz, which happened in the Bengal year 1180, and that notwithstanding the question as to the inheritance of that individual's property was agitated several times, she never, during the whole of this interval, advanced any direct claim; nor did she ever interfere, even as a third party in the numerous suits carrying on with a view to protect her own rights as wife, while the process of distribution among the other heirs was going on. In the decree of this Court, dated the 6th of October 1814, in the case in which Zuburdust Khatoon claimed a share of the estate, as daughter, it was written that it was unaccountable how so long a period had been allowed to elapse by the claimant, notwithstanding the fact that the estate had been taken in charge by the Court of Wards, owing to the incompetency of Alif Khan and his son Fyz Ali, and notwithstanding the fact that the other heirs had long since brought forward their claims to the estate. Now if the claim of Zuburdust Khatoon, which was preferred in 1806, was dismissed by this Court, by reason of the unaccountable delay which had been suffered to take place, how much more forcibly does the objection lie to the present claim which was not brought forward until twelve years afterwards, in the year 1818. In short, I do not conceive that any satisfactory evidence has been adduced in favour of the plaintiffs claim, which appears to me to be founded in fraud. I would therefore reverse the decrees of the Courts below and direct restitution of the property with mesne profits if any have been received."

The Third Judge (C. T. Sealy), concurred generally in the above reasoning, observing that it was evident from the deposition of Mussummaut Shahzadee Begum, one of the wives of Khoda Nuwaz, that he had seven wives, of whom Aina Khanum was the seventh and that the depositions of the respondents witnesses, which went to prove the contrary, were not entitled to credit; a final decree was accordingly passed, on the 27th of November 1827, to the effect suggested by the Second Judge.

1827.

Dec. 7th.

GUDADHUR PERSHAD
against
MAHARAJA TEJCHUND.

IN the above case which was pending in the Burdwan zillah Court, the Judge had imposed a fine, on an individual named Ramruttun Bose, for omitting to attend as a witness. This individual, when his property was attached for the purpose of realizing the fine, appealed from the order to the Calcutta Provincial Court, who annulled it on the ground that the *subpœna*, requiring the attendance of the witness had never been actually served on him. The Judge of the zillah, however, being of opinion that the annulled order was perfectly just and legal, requested a reference on the subject to the Sudder Dewanny Adawlut, on the following grounds—as set forth in his letter to the Calcutta Provincial Court, under date the 5th of July.

The case of Roopnarain Mitter, was similar to that now in question, and the fine of Rs. 500, imposed upon him by Mr. Molony, the Register of this Court, for non-attendance, although the *summons* had not been served upon him, was finally upheld by two Judges of your Court, and has been considered as a rule of guidance in such cases by this Court, since that time. It is true, that a difference of opinion existed in the Court on the subject; but it appears from the Sudder Dewanny Adawlut's letter, of the 24th of May 1820, that the orders of the Fourth and Officiating Judges, of the 4th of that month, confirming the fine were considered as final, and I cannot find any subsequent rule from your Court, or the Sudder Adawlut, setting aside the above, recorded in this office. The difficulty of procuring the attendance of witnesses is generally felt, and complained of by the Courts here, and if the construction now given by your Third, Judge and Fifth Judges, to section 6, regulation 4 of 1793—is to supersede that of your two Judges given in the case of Roopnarain Mitter, and to be held as a general rule, the difficulty will be obviously increased. Most natives of respectability have *mokhtars* about the Court, from whom they can receive notice of the issuing of any process against them, so that a person, who, from reluctance to appear in Court, dislike to taking an oath or from interested motives, wishes to evade a *summons* to attend as a witness, would, under the construction of the regulation, ha^e only to shut himself up in his house til the limited time of serving the *subpœna* had expired and his object would be obtained. In the present instance no means were left untried to procure the attendance of Ramruttun Bose. On the 23d of November 1823, and 2d of May 1825, attempts were made to serve *summonses* on him. On the 14th of July, of the same year, after the plaintiff's attorney had been sworn to the necessity of his evidence to the suit pending, a *dustuck* was issued against him, followed up, on the 5th of August, by a Proclamation for his attendance; and it was not until the 3d of October 1825, nearly two years from the issue of the first *summons*, that the fine was imposed; nor did he appear up to the time the case was finally disposed of, on the 25th of September of the following

1827. year. Under these circumstances, I submit, that there are reasonable grounds for believing he was aware of his having been *summoned* as a witness, and for considering his not appearing to give his evidence, as wilful disobedience to the orders of this Court. It would appear, at least from the proceedings of your Third Judge, that the Court have only the bare assertion of Ramruttun Bose that he was ill, and not in Burdwan, when the *subpoena* was issued, to prove his ignorance of the fact."

To this remonstrance the Calcutta Court of Appeal, replied in the following terms. "We have duly considered the facts stated by you, and your objections to the order in question; but we are still of opinion that the construction given by us to section 6, regulation 4, 1793, is correct; and that, under that rule, no fine can legally be imposed on a witness for non-attendance, unless he shall have been personally served with the *summons*, notwithstanding there may be reasonable grounds for believing, that he was aware of his having been *summoned* as a witness. We have reason to believe, that a similar construction of the section above-mentioned has, in more than one instance, been given by the superior Court. The rule appears to have been founded on principles of English law, which clearly require an actual service on the witness; and that it was not the intention of it to dispense with that service, is obvious from the explanatory wording of clause 2, section 2, regulation 50, 1803, which, in extending to the criminal Courts the rule prescribed in section 6, regulation 4, 1793—for procuring the attendance of witnesses in the Civil Court, distinctly recites, that "the power of committing to close custody, and fining any witness duly *summoned*, and after receiving the *summons*, not attending as thereby required, which by the section abovementioned is vested in the Judges of the Civil Courts, shall be equally vested in the zillah and city Magistrates, &c. &c. &c." We experience, equally with yourself, the difficulty generally felt of procuring the attendance of witnesses; we are aware, that our interpretation of section 6, regulation 4, 1793, may enhance that difficulty; but we are bound to construe and administer the law as it stands, and the provisions of penal regulations especially should be strictly and literally observed.

We direct therefore that you carry our former order into execution without further delay, and report the same for our information; but in the event of your still having doubts as to the correctness of our construction, we shall be happy to submit the proceedings and correspondence, with any further observations you may wish to offer on the subject, for the consideration and orders of the superior Court."

The Judge in rejoinder, however, stated that he still deemed a reference to the superior Court to be desirable and that the point on which he proposed the reference was whether a person *summoned* as a witness, and, aware of his being so *summoned*, who purposely evades the service of the *subpoena*, can be proceeded against under section 6 of regulation 4, 1793, by fine and attachment of property.

The Court of Sudder Dewanny Adawlut (present W. Leycester and A. Ross, Chief and Second Judges) having considered the sub-

ject of this reference issued the following orders. "The Court see no reason to depart from the construction laid down in their letter to the Commissioner, at Moorshedabad, dated the 27th of July 1814, that the rules contained in section 6, regulation 4, 1793, cannot be considered applicable to the case of a person whose attendance may be required as a witness, but on whom a *summons* may not have been served, that construction being in the following terms.

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" It appearing from the papers transmitted by you, that Gunga Ram has been duly served with a *summons*, and has failed to attend as promised in his written acknowledgment of the receipt of the *summons*, the Court remark that for such failure, he is liable under the provisions of section 6, regulation 4, 1793, to personal arrest, and a fine not exceeding five hundred Rs. As the witness has evaded the warrant issued for the seizure of his person, the Court are of opinion, that it will be proper to issue a Proclamation requiring his attendance within a certain period; and that if he should still neglect to attend, within the time limited in the Proclamation, you should impose such fine upon him as you may judge proper, not exceeding the amount above stated, and proceed to levy the same by attachment and sale of his property. With regard to the witness Govind Sircar, the Court remark that as the *summons* has not been served upon him, in consequence, as stated in the return made by the Nazir, of his having quitted his place of abode some time previous to the issue of the *summons*, the rules contained in the section above cited, cannot be considered applicable. The Court are of opinion, that you should instruct the Magistrate to make further and more particular enquiries respecting this witness, and endeavour to obtain information as to the place to which he has proceeded, and upon the same being ascertained, to adopt the proper measures for causing his attendance."

1827.

Dec. 11th.

MUGNEERAM, managing partner of the house of TILOCKSEE
and PADAMSEE, Appellant,
versus

GOKUL DAS and MAHABANDAS, Respondents.

Held that the negotiator of a forged draft or bill of exchange, receiving the amount thereof is liable to refund it to the plaintiff against him by the drawer; the payees named in the draft being unknown and the forgery proved.

THIS action was brought by Phoolchund, the managing partner of the house of Tilooksee and Padamsee, bankers at Benares, against the respondents, to recover the sum of 8,000 Rs. principal of two drafts, dated the end of the month of *Magh* and beginning of the month of *Cheyt*, of the year 1877, *Sumbut*. The suit was instituted in the Provincial Court of Benares, on the 17th of July 1821.

The plaint set forth that the defendants presented at the plaintiff's house, at Benares, a draft, dated the end of *Magh* 1877, for the sum of 5,500 Rs. purporting to have been drawn by their corresponding house at Jyepore, on the 1st of *Cheyt* 1877, in favour of Gyanchund and Jyeram Das, payable at forty-five days' sight. The plaintiffs, as is customary among bankers, accepted the draft, and relying on the respectability of the defendants, who had a shroff's establishment at Benares, gave them the amount of the draft which, the plaintiff, having made the defendants endorse, took from them and sent to inform their corresponding house at Jyepore of the circumstance. In six days the defendants sent another draft, for 2,500 Rs., dated 1st *Cheyt* 1877, *Sumbut*, payable at forty-five days' sight, purporting to have been drawn on them by their corresponding house, at Jyepore, and requested that it might be discounted. The plaintiff discounted it accordingly and sent the amount of the draft to the defendants, which draft the defendants retained in their possession.

The plaintiff afterwards, by letters from Jyepore, found out that both the drafts were forged and not drawn by the house at Jyepore, whereupon he demanded repayment from the defendants which they refused and on this account the present suit was instituted.

The substance of the defendants answer to the above plaint was as follows. "It is the custom among bankers when they grant a bill of exchange, to send at the same time information of their having done so to the *gomashta* of the house on which the bill is drawn, together with a copy of the bill. The drawees, on the receipt of this information, accept the bill, and, after the lapse of the time allowed for sight, pay the amount to the person in whose favour the bill is drawn and retain the bill, taking from the holder of it a receipt for the amount—and if any person accepts a bill and gives the amount thereof without receiving any information concerning it and the bill should turn out to be forged, the loss must fall on such person. If the plaintiff received no information concerning it, why did he without any proof accept the bill, dated *Magh* 1877, *Sumbut*, and pay the amount, and why did he discount the second bill? If he paid the amount of the bill without receiving notice from his correspondents, it is his (the plaintiff's) fault and he should sustain the loss. We have nothing to do with it as we were merely agents and sent the amount of the bill to the individuals on whose account we received it."

After going through the documentary and oral evidence adduced on both sides, on the 23d of April 1823, the First and Second Judges of the Provincial Court expressed their opinion, that there was not sufficient ground to sustain the action and therefore dismissed it with costs. The appellant having in the interim succeeded to the situation of managing partner of the house, at Benares, in the room of Phoolchund, and not being satisfied with the above award, appealed to the Court of Sudder Dewanny Adawlut.

On the 15th of January 1826, the Second Judge of that Court (C. Smith), delivered his opinion to the following effect. "I think the claim of Phoolchund (the plaintiff) for the amount of two bills, one of 5,500 Rs. dated *Magh* 1877, *Sumbut*, the other for the sum of 2,500 Rs. dated *Cheyt*, of the same year, (in all 8,000 Rs.) ought to have been decreed for the following reasons.

First. The receipt of the money is proved by the acknowledgement of the respondents. Secondly. The genuineness of the two bills and the receipt of the money from Gyanchund and Jyram-Das, at the house at Jyepore, have not been at all established and nothing is known of those individuals. Thirdly. It is an universal rule that if a person takes a forged bill to another and that other, trusting to the signature which proves to be forged, pay the sum for which the bill is drawn the person who presents it is responsible for the amount. Fourthly. The defence which the respondents make that no information was received from Jyepore, is futile, as the respondents themselves received the amount of the two bills, and although, advertizing to the customs of bankers, it would have been more correct to have waited for advice from Jyepore, still the mistake was committed with reference to the house at Jyepore, not with reference to the respondents, in so much that the house of Jyepore would be free from responsibility by reason of his not having waited for advice from them and the plaintiff would be held responsible for the amount of the bills; that is, the plaintiff would not be allowed to place the loss to the account of his corresponding house, but he would be left to recover the money by the best means in his power. Fifthly. There is a strong appearance from the circumstances of the case that the respondents were aware of the forgery and were anxious that the second bill should be discounted before the arrival of advice from Jyepore. The second bill was payable at forty-five days' sight, but had they not got it discounted and the amount paid before it became due, it was probable that the time for paying the amount of the second bill would not have arrived, before the receipt of an answer to the letter which the plaintiff wrote concerning the first bill to Jyepore and they would in that case not have received the amount of the second bill at all; for on receiving intelligence from Jyepore, the plaintiff would have become aware of the forgery of the first bill, and consequently would not have paid the amount of the second. Sixthly and lastly. The Judges of the Court of Appeal have stated, that the plaintiff, knowing it was the signature of the *gomashtha* of his corresponding house at Jyepore, paid the amount, and if he did not know that, he would not have paid it; but this is no reason for the dismissal of the suit of the plaintiff. The plain-

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and Maha-
baudas.

tiff certainly thinking it was the signature of his correspondent at Jyepore, paid the money and if he did not think that, why should he have paid it? From this circumstance this much only is proved that the signature was forged with so much ingenuity that the person who was acquainted with it was deceived, and under the delusion paid the money. But as the authenticity of the drafts and of the signature has been by no means proved, the simple fact of the plaintiff's having been deceived as to the signature can be no good and sufficient reason for exonerating the defendants from the obligation of refunding the money they have received." Under these circumstances the Second Judge was of opinion, that the decree of the Benares Court of Appeal, dated in April 1823, should be reversed with costs.

Afterwards the case came before the Third Judge (C. T. Sealy), on the 16th and 17th of April, and all the proceedings of the Provincial Court, together with the opinion of the Second Judge of this Court were perused. The substance of the plaintiff's case he observed is this; that the defendants brought to him (the plaintiff) two bills purporting to be from his (the plaintiff's) correspondent at Jyepore, and that, trusting to the defendant's, the plaintiff gave them the amount. The plaintiff afterwards found out that they were not drawn by the house at Jyepore; this action is therefore brought to recover the amount of the above bills from the defendants. The defendants set forth that when any one takes a bill for money to a banker, that banker, after accepting it and after the lapse of the stipulated time and receipt of advice from the house by which it was drawn, and having satisfied himself of its genuineness, pays the amount to the bearer of it; that if after that the banker finds out that it is forged, the loss would be his, and that they (the defendants) remitted the amount of the bill to the person from whom they received it, and they are not in any way responsible. Before passing a final order the Third Judge deemed it proper to direct that the customs of bankers should be enquired into. The Judges of the Benares Provincial Court were therefore required to obtain a reply from some of the principal bankers of that city to the following question. "A banker pays to a person (not the person in whose favour the bill is originally drawn) the amount of a bill after the lapse of the stipulated time and likewise gives the amount of another bill of the same kind before the lapse of the stipulated time by discounting it, to the bearer of the bill, under the supposition that it was drawn by his corresponding house, and afterwards finds out that they were forged; when the forgery is proved can he recover the money from the person to whom he paid the amount or not?

The reply received to this reference being favourable to the appellant's claim and the Third Judge fully coinciding in the opinion expressed by the Second, it was finally ordered that the decision of the Court below should be reversed with costs. The appellant was further declared at liberty to sue the respondents for interest on the amount of the bills received by them.

RAM PERSHAD AVUSTEE, Appellant,
versus
 UDAROO, Respondent.

1897.

Dec. 12th.

THIS action was brought in the Dewanny Court of zillah Bunderkund, by Ram Pershad, *versus* Udaroo, on the 28th of August 1817, to recover 166 Rs. 2 annas, amount of an award against him by the *Sudder Ameen* of the said zillah.

It was stated in the plaint that in the year 1221 F. S., the plaintiff, by virtue of a mortgage, came into possession of certain lands belonging to Rai Sein, to the extent of twenty-seven beegahs, fourteen biswas, situated in mouza Luka pergunna Banda: and that the rents due on it were regularly paid by him accordingly. The defendant, giving himself out as the recorded proprietor, attached the effects of the cultivators by distress for 105 Rs. The plaintiff became security for the cultivators and instituted a summary suit against the defendant on their parts in the zillah Court, in which he the plaintiff obtained a decree. On this the defendant brought his action which was referred to the *Sudder Ameen*. When the case was heard the plaintiff was in confinement on account of arrears of Revenue and could not therefore appear to defend the suit. On his liberation he applied to the *Sudder Ameen* for time to prepare his defence but his application was not listened to, and, the case being proceeded in, a decree was given against him. The plaintiff was then purposing an appeal, but the defendant referred the matter to the inhabitants of the village and by their arbitration an adjustment was made and the dispute amicably settled. A razeenama was executed on this occasion but on account of the Court's being closed for the holy-days it could not be filed though it was deposited with the *putwarree*. On the 16th of June 1817, notwithstanding the above arrangement, the Register, since the ikrarnama was not filed previous to the passing of the decree and no mention of such a thing had occurred in the course of the suit, ordered that the execution of the decree should not be delayed and that the plaintiff should pay the award and costs with liberty to sue hereafter for reimbursement: hence the present action was brought.

The reply of the defendant set forth that the lands mentioned in the plaint had for years been part of his estate and that Rai Sein the mortgager had always paid the zamindars fixed dues to him as was specified in the *putwarree* accounts. In the year 1221 F. S. the plaintiff gaining the connivance of the cultivators, procured the payment of the said dues to himself and on this ground the attachment issued against them. On this the plaintiff, having become security for the cultivators, brought an action in their names against the defendant for wrongful distress before the Collector and obtained a decree, he the defendant being at the same time directed to sue in the Dewanny Adawlut. He sued and got a decree in his favour from the *Sudder Ameen* to whom the case was referred. In the year 1223, notwithstanding the above decree of the *Sudder Ameen*, the plaintiff, without any authority, commenced ploughing the land, and petition being made by the defendant

1827. *Ram Per-shad Avus-tee, v. Udaroo.* to the *soudaree* Court, he was directed to stick up a notice that if the plaintiff took a *pottah* and *qubooleut*, he might retain possession; and if not the defendant should be reimbursed at the rate *per beegah*, specified in the notice, and the plaintiff petitioning against this order was directed to sue in the Dewanny Court. The defendant in the year 1223, obtained a decree against the plaintiff in a suit for arrears of rent up to that date, had since received the rents regularly from the cultivators and had paid revenue to Government. The defendant further stated that the arguments of the plaintiff resting on the mortgage deed and *ikrarnama* were invalid since the one was one hundred years old, and the other had been rendered null by the non-performance of its conditions on his part.

On the 27th of June 1818, the zillah Judge gave a decree for the plaintiff with costs and reimbursement for damage sustained agreeably to section 6, regulation 28, 1803.

The defendant appealed to the Benares Provincial Court, on account of the damage money awarded in addition to the award and costs. On the 11th of March 1823, the First and Officiating Judges of that Court reversed the above decree with costs; they held that the respondent should have appealed from the *Sudder Ameen* if dissatisfied with his decree: that he had not performed the conditions of the *ikrarnama* was evident from his own statement and the evidence of one of the witnesses: they saw no reason to alter the decree of the *Sudder Ameen* and thought the zillah Judge wrong in awarding reimbursement for damage.

A petition was presented for a special appeal to the Court of Sudder Dewanny Adawlut. It was granted on these grounds: that, whereas in the zillah Court the amount sued for, was only 166. 2. the zillah Judge had awarded not only that sum but a further one for *tawan* (damage). It appears too that on the appeal the petitioner had stood on the same ground, claiming only the originally named sum of 166. 2.

Nevertheless the Judges of the Provincial Court in reversing the zillah decree had saddled the petitioner with costs upon the sum of 332 Rs. i. e. the originally sued for sum and the *tawan*, together with the costs in the zillah Court. This was contrary to the regulations. With regard to the other points of the case it appeared that the petitioner had sued for the reversal of a summary decree; but as, on examination, the decree appeared to have been regular and not summary, no reversal could take place the petitioner not having brought his appeal within the time allowed. The appeal was therefore allowed for the costs on the sum of *tawan* or damage.

The case came to a hearing, on the 7th of July 1827, and the Second Judge (C. Smith), for the reasons mentioned in the proceeding admitting the appeal, amended the decree of the Provincial Court, so far as related to the costs on the *tawan* which were to be repaid to the appellant. The costs of appeal were made payable by the respondent.

The Third Judge (C. T. Sealy), concurring in the above opinion, a decree was passed accordingly.

RAMDOOLAL MISSER, MUSSUMMAUT SUCHEEMUNEE, 1697.

WIDOW of RAJNARAIN MISSER and JUGESUR MISSER,

Appellants,

versus

Dec. 29th,

RAMMOHUN SAWUNT, JUGGUNATH SAWUNT,

RAMKAUNT SAWUNT and RANEE KUNWUL

KOONWUREE, Respondents.

RAMMOHUN Sawunt and Jugunnath Sawunt were the plaintiffs Held by in this case. They sued to set aside the second settlement of Lot the Court Gurh Chumuk and to obtain possession of Budour and twenty other mouzas, situated in the said lot. The claim was laid at 8,000 Rs. the annual jumma, and there was a further claim of 5,168 Rs. on account of profits unduly appropriated for two years during 1224 and 1225 B. S. The total claim was thus 13,168 Rs. and the action was brought in the Calcutta Provincial Court, on the 19th of June 1819. The defendants were Ramdoolal Misser, Rajnarin Misser, the husband of Mussummaut Suceemunee, and Indurnain Misser, the father of Jugesur and Ramkaunt Sawunt. It was set forth in the plaint that the father of the plaintiffs purchased, in the name of their eldest brother Ramkaunt Sawunt, the talook of Gurh Chumuk, comprising thirty-five mouzas, from Ranee Kunwul Koonwuree, for the sum of 17,025 Rs. and subject to an annual jumma, of the same amount, to be held by him as a putnee talook-dar; that he continued in possession of the tenure, until the year 1215 B. S. when he died, leaving the plaintiffs his sons (including the above named Ramkaunt) him surviving; that, subsequently, on account of a dispute among the brothers, the question as to shares of the estate was litigated in the Calcutta Court, and was decided on the basis of a deed of partition mutually agreed to by them; that the talook was made into four lots, Gurh Chumuk and seven other mouzas falling to the share of Ramkaunt; Budour, and, ten other mouzas to the share of Rammohun Sawunt; Amsa and nine other mouzas to the share of Juggunath Sawunt and Radhanugger and the six other mouzas to the shares of all three brothers to be held in common, the jumma on the common portion being 4,552 Rs.; that the name of Ramkaunt remained as before recorded on the zemindaree records of the Ranee and through him the rents were paid; that in the year 1223. B. S. he omitted to pay the rents and the Ranee refused to receive them from the hands of the plaintiffs; that the plaintiffs, therefore deposited their proportion of the revenue in Court, notwithstanding which the Ranee sued Ramkaunt for the whole of the rents with interest in the Hooghly Court, under regulation 7, 1799; that Ramkaunt did not appear, and that the plaintiffs according to the decree of the zillah Court, dated the 2d of August 1817, paid in the sum of 6,459 Rs. on account of the arrears of rent due from the defendant; the plaintiff at the same time causing his property to be sequestered by order of the Judges of Hooghly and 24-Pergunnas with a view to reimburse themselves for the loss they had sustained by the fraudulent conduct of the said Ramkaunt; that the individual in question, being still bent upon making an alienation of the estate, procured another

1827. action to be brought against himself for arrears by the Ranee in the Hooghly Court, under regulation 7, 1799; that the plaintiffs upon this, having presented a petition that the rent for the entire *talook* might be received from them, the Judge of Hooghly passed an order, on the 13th of April 1818, that a *perwanna* should be written to the Ranee desiring her to make a transfer of names, which was not issued until four months after, and that on the 30th of June of the same year, although the plaintiffs were present and willing to pay up the whole arrears claimed, the Judge passed an order that unless the defendant Ramkaunt should pay up the arrears within fifteen days from that date, the Ranee (the plaintiff in the summary suit) should be at liberty to make a settlement of the property with any other person; that the plaintiffs, within the period specified in the proclamation, deposited the sum of 13,578 Rs. being the amount of the arrears on their own portions, of which deposit however the Judge never sent notice to the Ranee, nor did he deduct it from the whole sum claimed, which, had it been done, would have left a balance of only 4,294 Rs. on account of the share of Ramkaunt; that the Judge of the zillah made no investigation into the negligence of his *omla* in having delayed so long to issue the *perwanna* for transfer, nor did he make any enquiry into the fact of the proclamation for the second settlement having been dated on the 10th of July 1818, and its having been issued on the 22d of the same month, or into the facts that in less than fifteen days after the date of the proclamation, the bearer of it returned from the *mofussil*, that the *Nazir* reported it had been duly served on the 7th of August of the same year, and that intimation was received on the 10th of the same month, that the second settlement had been actually made with Ramdooleal Misser, Indurnarain Misser and Rajnarain Misser; all which could only have been by the fraud and connivance of Ramkaunt, the Ranee, and the aforesaid Missers; that on the 25th of September of the same year, the Judge confirmed the second settlement and that when the plaintiffs appealed against this order to the Provincial Court they were directed to institute a regular suit for the purpose of establishing their right.

Of the defendants Ramdooleal Misser and Rajnarain Misser gave in a reply to the following effect. Lot Gour Chumuk was the *talook* of Ramkaunt Sawunt and on account of his falling in arrears the zemindar, Ranee Kunwul Koonwuree, sued him for the sum of 17,785 Rs. rent due for the year 1224 B. S. together with interest according to regulation 7, 1799. On the 30th of July 1818, the defendant having absconded, the zillah Judge struck the suit off the file and ordered that a proclamation should be issued to the effect, that, if within fifteen days from the date thereof, the defendant did not pay up the arrears of rent, the Ranee should be considered at liberty, agreeably to clause 7, section 15, regulation 7, 1799, to make a settlement with any other person. Ramkaunt having failed to pay up the arrears within the date specified, the defendant, in conformity to the rule cited, made a second settlement with the two defendants and Indurnarain Misser in consideration of the sum of 18,585 Rs. and at a rent of 17,025 Rs. Having deducted the sum received from us for the tenure from the sum

CASES IN THE SUDDER DEWANNY ADAWLT.

claimed from Ramkaunt, the Ranee reported the second settlement to the Judge. Having received the title deeds from the Ranee we have continued in undisturbed possession ever since, regularly paying up the rents. The plaintiffs are entire strangers nor are their names any where to be found in the zemindarees records. They had no concern with paying any rent of the estate; nor was there any complaint made against them on that account by the Ranee. It is therefore improper to institute any enquiry into the legality or otherwise of our purchase at the instance of the plaintiffs, who have no right of interference whatever; but Ramkaunt, the original proprietor, who was turned out, well knowing the legality of our purchase has not joined in this suit. Besides the time limited in the proclamation, dated the 30th of June 1818, was fifteen days: the period limited therein, consequently expired on the 15th of July. Two months afterwards and subsequently to our purchase, the plaintiffs paid only a small sum of the arrears claimed. It is evident, that, unless the whole of the arrears were paid up, the sale could not be stopped, and as, agreeably to clause 7, section 15, regulation 7, 1799, it was only necessary to legalize a second settlement that the order of the Court should be obtained, the legality of this transaction cannot be questioned. In this case, moreover, the fact of the arrears is established by the admission of the plaintiffs themselves, and, upon this fact, the decision of the Judge was founded and the proclamation was issued. Under these circumstances it is absurd to question the legality of the second settlement."

Indurnarain Misser presented a petition stating that he was not desirous of adding any thing to the pleas advanced by the other defendants, Ramdoolal Misser, his father and Rajgarain Misser, his brother, and dying shortly afterwards, was succeeded in the suit by his son Jugesur Misser. The defendant Ramkaunt Sawant replied by stating that he had been violently and unjustly expelled from the tenure by the plaintiffs, in consequence of whose oppressive conduct he had fallen into arrears, which being unable to pay, the Ranee caused a second settlement of the tenure to be made. The plaintiffs in replication urged that the peon of the *Nazir* of the Court, by order of the Judge, on the 19th of *Sawun* 1225, stuck up, in the *mofussil*, a proclamation authorizing the Ranee Kunwul Koonwuree to make a new settlement after the 2d of *Bhadoon* of the same year; but that the Ranee, within three days from the date of the proclamation, that is, on the 21st of *Sawun*, sold the tenure to the Missers. Ranee Kunwul Koonwuree did not attend to answer the plaint.

On the 25th of July 1823, the Senior Judge of the Calcutta Court of Appeal, passed judgment in this case in favour of the plaintiffs, being of opinion that they had established their possession and proprietary right, and that the second settlement made by the Ranee, having taken place within the period specified in the proclamation, was unjust and illegal. He therefore ordered that the second settlement made by the Ranee, on the 21st of *Sawun* 1225 B. S., with Ramdoolal Misser and the other purchasers should be set aside, and that the plaintiffs should be restored to the possession of the tenure with mesne profits to

1827.

Ramdoolal
Misser and
others, v.
Rammolina
Sawant
and others.

1827. be paid by the purchasers, to whom was awarded repayment of the purchase money they had deposited. Ram Kaunt was declared liable Ramdoolal Misser and others, v. for all costs of suit, and with a view to avoid all future disputes it was directed that the several shares of the talook should be entered in the names of their respective proprietors.

Rammohun Sawunt and others. The appellants being dissatisfied with this decision appealed from it to the Court of Sudder Dewanny Adawlut. On the death of Rajnarain Misser, his widow Suceemugee succeeded him. The Ranee Kunwul Koonwuree declined having any thing to do with the suit, in which she stated her interests were not concerned. A petition was given in on the part of a second Rammohun Sawunt, to the effect that he had taken a durputnee tenure of Radhanugger and six other mouzas and praying that his interests might not be lost sight of. On the 28th of August 1827, the Chief Judge of the Sudder Dewanny Adawlut (W. Leycester), after having attentively considered the whole of the proceedings connected with the case, delivered his opinion to the following effect. "It is clear that the plaintiffs deposited, on the 17th of July, the sum of 2,301 Rs. and on the 27th of the same month, the sum of 11,277 Rs. or a total of 13,578 Rs. on account of the arrears for the year 1224 B. S. After deducting that sum there remained a balance of arrears amounting only to four thousand two hundred and some odd Rs. claimable from Ram Kaunt Sawunt the puthneedar. Nevertheless the Ranee was unquestionably at liberty, conformably to the order of the Court, dated the 30th of June 1818, to make a second settlement of Lot Gurh Chumuk. The fact of the plaintiffs having deposited the amount of the arrears which had accrued on their shares cannot be held to form any obstacle to the second settlement and the order dated the 13th of April 1818, to transfer the tenure to the name of the plaintiffs agreeably to the petition presented by them to that effect was improper and illegal. Although it is not exactly proved on what day the proclamation alluded to in the decree of the Court below was issued, yet it is sufficiently established that the second settlement did not take place until more than a month had elapsed after the expiration of the date specified in the proclamation. Under these circumstances it is probable that all the necessary forms and rules were observed. I am, therefore of opinion, that the decree of the Court of Appeal should be reversed and the claim of the respondents dismissed with costs, except those of Ram Kaunt Sawunt, who should be held personally responsible for the costs incurred by himself in both Courts."

The case having next come before the Second Judge (A. Ross), he deemed it proper to put the following questions to the vakeels of the respondents. What became of the sum of 13,578 Rs. which was deposited by Rammohun Sawunt and the others in the zillah Court? To this they replied that this sum had been taken by Ramdoolal Misser and the other purchasers under the fraudulent pretence that it was due to them on account of profits unduly appropriated by the respondents who, they alledged, had illegally retained possession of the tenure after it had been transferred to the appellants. The appellants vakeels were next asked whether the assertion of the respondents was true or otherwise relative to the money which had been deposited, to which, they replied it was true that their

clients had received the amount of the deposit from the Treasury, 1827, of the zillah Court, but the reason was, that for some months, ^{Ramdoolal} after the purchase made by the appellants, their entry was prevented ^{Misser and others.} by Rammohun Sawunt and Juggunath Sawunt, who, by force of arms, retained possession of the tenure and usurped the profits, ^{Rammohun Sawunt and others.} on which account the zillah Judge after having ascertained ^{by} means of an *Ameen* that the profits unduly appropriated amounted to 15,000 Rs. caused to be refunded to the appellants the sum which had been deposited by the respondents and that at the present day there was due to the appellants a sum of nearly two thousand rupees on this account. The Second Judge in passing his judgment recapitulated the leading particulars of the case in the following manner. " It appears that before the second settlement of Lot Gurh Chumuk, which comprised thirty-five mouzas, Ram Kaunt Sawunt was recorded as the *sudder putneedar* in the zamindaree Registry books of Ranee Kunwul Koonwuree; that the Ranee, consermably to the permission of the Court, dated the 30th of June 1818, on account of arrears due from the *sudder putneedar*, for the year 1224 B. S., sold the said lot, by public auction, to Ramdoolal Misser, on the 24th of Sawun 1225 B. S., on which date the arrears due from Ram Kaunt the *sudder putneedar* had not been liquidated; that Ram Kaunt never objected to such second settlement and that the Judge of the zillah Court confirmed it on the 25th of September 1818; that afterwards Juggunath Sawunt and Rammohun Sawunt, who were sharers in the tenure with Ram Kaunt, the *sudder putneedar*, but whose names were not registered in the zamindars books, petitioned the Provincial Court to have the second settlement set aside on the following grounds; namely, that, on the 30th of June 1818, an order was passed by the zillah Court that a proclamation to run fifteen days should be issued to the effect, that if within that period the defaulter did not pay up the arrears the Ranee should be considered at liberty to make a second settlement of the property with some other person, and that the Ranee, in contigavention thereto, made the second settlement within three days from the date of the proclamation, that is, on the 21st of Sawun, although the petitioners who were sharers of the *sudder putneedar* were present and willing to pay the arrears of rent claimable from him. But, I am of opinion, that those pleas of the respondents should not legally have availed them, they not being the *sudder putneedars*, and Ram Kaunt, the individual who was so, not having made any objection to the second settlement which was confirmed by the zillah Court. Besides the respondents did not deposit the whole arrears claimed from the *sudder putneedar* amounting to 17,578 Rs. They deposited in the Treasury of the zillah Court only 13,578 Rs. On these grounds, I am, also, of opinion, that the decree of the Court of Appeal should be reversed and the respondents claim dismissed with costs except those of Ram Kaunt, which, in both Courts, should be borne by himself; and so far my opinion is in unison with that of the Chief Judge. But with respect to other points of this case (not touched on by the Chief Judge) my opinion is as follows. I think that the amount of the deposit made by Rammohun Sawunt and

1827. the rest in the Treasury of the zillah Court should be restored to them with interest, after deducting the amount of the mesne profits realized by them between the period on which they obtained possession in pursuance of the decree passed by the Court of Appeal, in Rammohun's favour and that on which they were dispossessed when directions for suspending the execution of that decree were issued by this Court; that the mesne profits in question should be restored with interest to the appellants; that if the appellants conceive they have any just claim for profits said to have been unduly appropriated by the respondents, in consequence of their having kept them out of possession between the period of their purchase and the institution of the suit by the respondents, they should institute a regular suit for the recovery thereof; that with respect to the second Rammohun Sawunt who claims as a *durputneedar*, no order can issue inasmuch as the loss of his tenure is involved in that of the *sudder putneedar*; that the *vakeel* of this individual should receive the sum of 50 Rs. as remuneration for his trouble to be levied by the Provincial Court, and that the original plaintiffs, now respondents, Rammohun Sawunt and Juggunath Sawunt, be instructed that they are at liberty to sue the *sudder putneedar*, Ram Kunt Sawunt, for any damage they may consider themselves to have sustained, attributable to his fraud or impropriety of conduct."

The proceedings having been again referred to the Chief Judge, he entirely concurred in all points with his colleague, and a final order was accordingly passed, on the 29th of December, confirming in every particular to the opinion recorded by the Second Judge

CASES IN THE SUDDER DEWANNY ADAWLAH.

HENRY IMLACH, CHARLES TREBECK, and JOHN PALMER, Executors of UNWUR BEGUM, Deceased, Appellants

versus
MUSSUMMAUT ZUHOOROONISA KHANUM,
Respondent.

Jan. 28.

THE respondent instituted this suit in the Patna Provincial Court on the 22d of September, 1815, against Unwur Begum, to obtain possession of one half of the estate, real and personal, of the late Hajee Yakoot Khan, husband of the defendant. The share claimed was estimated at 76,519 rupees 8 annas.

The claim rested on a will made by Hajee Yakoot Khan in Jumadee-eos-Sanee 1216 A. H. (1801 A. D.) In this will he appointed Mr. L, a Judge of the Provincial Court of Patna, his executor, and dedicated half his estate, real and personal, to the service of the Imams as *nuzur-i-Imamein*, to be delivered to Zuhooronisa Khanum for the use of her Imambarah. Mr. L died on the 24th of January 1804, and Hajee Yakoot Khan on the 19th of July 1812. On the decease of the latter, Meer Moohummud Khan got possession of his estate, but was forced to relinquish it in favour of Unwur Begum, on her obtaining a decree to that effect in a summary suit, which she brought against him in the City Court of Patna. The plaintiff, who had been the mistress of Mr. L, was a party to the summary suit, but was referred to regular proceedings, which she accordingly instituted in the Provincial Court, to obtain possession of the half of the estate entrusted to her charge under the provisions of the will.

The plaintiff objected against the legality of the will, on the grounds, that a Mosulman could not appoint as executor any person but one of his own persuasion, that the bequest could not be considered an endowment, (*wukf*) because it was designed for the service of the Imams, and not of God; and that even if it were intended as an alienation of property, it could only take effect to the amount of one-third. She also pleaded that, after Mr. L's death, Hajee Yakoot Khan had said the will had only been executed to answer a temporary purpose in regard to that gentleman; that he then annulled it; that the plaintiff concurred in the annulment; and that it was fully understood that the demise of the executor, and the non-appointment of another in itself cancelled the will.

Before the case came on Unwur Begum died, and the suit was carried on in the names of Messrs. C. Trebeck, H. Imlach, and J. Palmer, executors under her will. The Senior Judge of the Patna Court referred the will to the Mahomedan law officers, and required them to state whether the document was valid, and the plaintiff legally entitled to the amount she claimed under its provisions.

Moohummud Jumal Ali, the Vazee of the Court, delivered a *fatawa* to the following effect: "Zuhooronisa can sue for the half of the estate of Hajee Yakoot Khan, because although a dedication (*nuzur*) strictly speaking is not valid, except when made to God, yet as the original wish of the testator is to obtain re-

1828.

Henry Intach, Chas. Trebeck, and John Palmer, v. Mussum-maut Zuhooroopisa Khanum. wards in a future state, which are at the disposal of the Almighty, the expression *Nuzur-i-Imamein* implies a *nuzur* to God, and the discharge of such *nuzur* is obligatory. The use also of the term *nuzur* in reference to the holy Imams to Wulees and Sheiks is commonly recognized, and such expression is held to imply a *nuzur* to God. Zuhooroonisa is therefore entitled to the share specified in the will, and she is bound to bestow it in alms on distressed Moosulmans, so as to fulfil the will of the testator."

Mouluvee Uhmudee the Mooftee delivered a *futra* a little varying from the above. "Zuhooroonisa can sue for half the estate of Hajee Yakoot Khan. It is a fundamental rule that the words of a competent person be carried into effect as far as possible; and that, if they are not legal in their literal acceptation, a liberal construction be put upon them. By this rule a *nuzur* to Imams, &c. is held to mean *wukf*, and, therefore, the bequest of Hajee Yakoot Khan is legally *wukf*, and the direction to deliver it over to Zuhooroonisa for the use of her Imambarah, is tantamount to appointing her *Wulee*, or superintendent of the endowment. With regard to the validity of the document in question, it may be remarked, in the first place, that the appointment of Mr. L. as executor is liable to some exceptions: 1st. The appointment of an executor, legally so called, is for the protection of the rights of minors or absent heirs; neither of whom exist here. 2dly, Although the appointment by a Moosulman of a person of another religion to be his executor is valid, yet it is incumbent on the ruling power to take the trust out of his hands, and appoint another executor. 3dly, Mr. L. died before the testator, and this necessarily voids the appointment. In the next place, with regard to the dedication of half his estate as *nuzur-i-Imamein*, and the direction to deliver it over to Zuhooroonisa Khanuni for the use of her Imambarah. This is equivalent to an endowment, and the appointment of her as superintendent, and is therefore valid, and must be carried into effect."

On the 3d of March 1824, the Senior Judge of the Provincial Court decided, that although the evidence to the will was exceptionable, yet it must stand, as the defendant had not questioned its authenticity; that so vague a verbal annulment as had been pleaded, could never be upheld; and that in conformity with the *futra* of the law officers the defendant should make over to the plaintiff half the estate of Hajee Yakoot Khan.

The defendants being dissatisfied with this decision, appealed to the Sudder Dewanny Adawlut, and on the 28th of August, 1827, the case came to a hearing before the Second Judge (C. Smith). Previous to giving judgment he put the following question to the law officers: "A certain Moosulman of the Imameeyah sect, to flatter a Judge of the Court, bequeathed half his estate, as *nuzur-i-Imamein*, for the use of an Imambarah belonging to a Moosulman woman, who was mistress of the Judge. He drew up a will to this effect, in which he appointed the Christian Judge his executor. He lived eleven years after the execution of this deed, and at length died, seven years after the death of the executor, without appointing any other in his place. Can the aforesaid woman sue for the property thus bequeathed, notwithstanding the opposition of the testator's widow to her claims?" The Cazeeoolcuzat and the two Mooftees

returned an answer to this effect: "The bequest by a Moosulman of the Imameeyah sect of half his property to an Imambarah, and the appointment of a Christian as his executor, are legal acts; nor does the fact of his surviving the execution of that deed, eleven years, or the demise of the executor three years afterwards, imply an annulment of the deed, because annulment of a will does not take place, unless it be made in express terms, or evidently implied by some action. The opposition of the widow to the claim implies the non-concurrence of the heirs, and therefore the bequest will only take effect to the amount of one-third: and whereas the executor is dead, and the testator appointed no other in his place, it is incumbent on the ruling power to appoint some executor, to see that the sum bequeathed is expended on the Imambarah. This executor may be either the woman herself, to whom the Imambarah belongs, or some other person. The woman, however, has no legal right to the property as her own possession."

On receipt of this *futna* Mr. Smith delivered the following opinion: "Should the case be decided according to the *futna* of the law officers, the decree of the lower Court would need amendment, because in it no mention is made of the necessary appropriation of the bequest to the expenses of the Imambarah; and because the respondent is legally entitled to only one-third of the property, whereas one half has been awarded her. In my opinion, however, the decree of the Provincial Court should be entirely set aside. I am not satisfied with the evidence adduced to prove the document filed to be the real will of Hajee Yakoot Khan. Whether it be or be not the real will, it appears that the Hajee, being much irritated by the conduct of Zuhooroonisa, annulled the deed, and would have destroyed it, if he could have possessed himself of it. It is also evident, that if it had been his intention to abide by that will, he would on the death of the executor, which happened seven years previous to his own demise, have appointed another in his place. Now a will by which the testator does not abide till the time of his death, can never be carried into effect. Again, there is no relationship or any connection between the parties assigned as a reason which could induce the Hajee to execute such a deed in the respondent's favour; but it appears, that, at the time he drew it up, she was the mistress of the executor, who was then a Judge of the Provincial Court in the city of Patna, in which the testator resided. The Hajee then could have had no other object than to flatter the Judge, and such conduct differs little from bribery: for the offer of a consideration to the mistress, is much the same as to the Judge himself. To call it *nuzur-i-Imamein* is nothing more than a shallow artifice to gloss over the transaction. Independently then of all legal considerations, and supposing even the authenticity of the document to be fully established, it is not such as the Court can ever uphold. In the reply furnished by Mouluvee Uhmudee in the Provincial Court, the will is said to be invalid, in the exceptions taken against the first provision of it: and on this supposition the whole of the property, according to the most approved opinion, goes to the widow, either as her share or by the return. My opinion therefore is, that a decree should be passed in favour of the

1828.

appellants, and the original suit of the plaintiffs dismissed with costs."

Henry Im-
lach, Chas.
Trebeck,
and John
Palmer, v.
Mussum-
maut Zu-
hooroopisa
Khanum.

The Third Judge (C. T. Sealy) did not concur in this opinion. He thought that the decree of the Patna Court should be amended agreeably with the *furore* of the law officers, awarding one-third of the property to the respondent for the use of her Imambarah.

The Chief Judge (W. Leycester) agreed with the Third Judge. He conceived the will of Hajee Yakoot Khan to be satisfactorily proved, and that a verbal annulment of it could not be upheld; that there was no regulation against a will to the effect of the one in question; nay, that it would have been legal, even if made in favour of Mr. L. himself. A decree was passed accordingly, (on the 28th of January 1828,) amending the decree of the Provincial Court, and awarding one-third of the estate, real and personal, of Hajee Yakoot Khan to the respondent, the proceeds to be expended in the service of the Imambarah. (a)

1828.

March 5th.

GOVERNMENT, Appellant
versus
DHOLA SINGH and GOPAL SINGH, Respondents.

Under section 2, regulation 43, Government are entitled, on the death of the grantee, to revenue and the Zumeendar grants in Be-nares assigned in the decen-nial settle-ment. THIS was a suit originally instituted by the respondent Gopal Singh, and Debee Dyal Singh, in the Mirzapore Zillah Court on the 11th of June 1814, against Dhola Singh the other respondent, and involved a claim to 902 rupees 8 annas, on account of five years' *malikana* for mouza Muchwa in Adulpoorah, purgunna Kuryat Secundeh, commencing from the year 1217 *Fuslee*, and calculated at the rate of 180 rupees 8 annas per annum.

The plaint set forth that in 1196 F. S. Donda Singh, a Native Officer, received from the British Government a grant of six hundred beeegas of land in Adulpoorah the plaintiff's ancestral estate, upon which mouza Muchwa was subsequently established. Donda Singh died about the end of 1204 F. S. and his son, in contravention of the conditions of the grant, and clause 5, section 2, regulation 43, 1795, enjoyed possession of the village in question for five years without paying *malikana*. Ramheyt Singh their ancestor in consequence petitioned the Collector for the recovery of his proprietary rights, and an *aumeen* was appointed to ascertain the actual proceeds of the lands, who submitted his report; and, none of the late Donda Singh's heirs appearing in conformity with the order and notifications promulgated, the plaintiff's father obtained a grant of the

(a) This decision is perfectly consistent with the former judgment of the Court in the case of Moohummud Ameenoodeen and Ram Mohun Chukerbutty, appellants, v. Moohummud Kuberoodeen, respondent, (March 31 1825,) in which it was ruled that the appointment by a Mosulman of a Hindu as executor to his will, does not prejudice the rights of the legatee.

village in question, subject to a fair and proportionate assessment and certain allowances for the defrayment of contingent expences, enjoyed possession during his own life time, as did the plaintiff on his death till 1216 F. S. when Dhola Singh, son of the late Donda Singh, obtained an *amuldustok*, or order for possession, from the Collector, and carried it into execution. Although the plaintiff sued and substantiated his title as zumeendar, the Zillah Judge confirmed the above individual in possession of the village, but on the presentation of a petition awarded the plaintiff *malikana* by an order under date the 20th of July, 1812, which was overruled by the Provincial Court, who directed him to institute a civil suit for the recovery of his proprietary rights. These were the grounds of the present action.

The defendant in reply contended, that the present suit for *malikana* was clearly inadmissible, being merely a modification of the plaintiff's original and fundamental claim to the zumeendaree, which was dismissed by the Zillah Judge on the 9th of July 1812, whose award of *malikana* had, after the maturest consideration, been entirely disapproved, and reversed by the Provincial Court. This could be proved by the proceedings of the Provincial Court under date the 15th of July and 25th of December 1813, and 11th of March 1814, which he was ready to produce. The plaintiff's statement, of his having been referred to a civil suit by the Provincial Court, was therefore evidently false.

The officiating Zillah Judge, in deciding the cause on the 6th of February 1817, observed that the oral and documentary evidence adduced by the plaintiffs, had substantiated their proprietary right to Adulpoorah as an ancestral estate, and that they were therefore entitled to *malikana* under the grant to Donda Singh, executed on the 8th of September 1789, (17th of Zeehijjah 1196 F. S.) But considering that such an award was barred by the proceedings of the Provincial Court under date July 15th and December 25th 1813, and 11th of March 1814, he dismissed the suit with costs.

The plaintiffs appealed to the Benares Provincial Court, and, in conformity with the order contained in the Court's proceeding of the 18th July 1818, Gopal Singh, one of the claimants in the Zumeendaree Case, (No. 3459,) appealed against the decree passed therein by the Zillah Judge on the 9th of July 1812.

The respondent Dhola Singh having appeared to plead, the First and officiating Judges concurred in passing the following decree on the 18th of May 1821.

After a due consideration of all the documents produced in the two causes submitted for decision, the Court are of opinion, for the reasons recorded in case (No. 3459), which involves a claim to the zumeendaree of mouza Muchwa, that the appellants have succeeded in substantiating their proprietary title to the village in question. In consequence, however, of its being included in the *jageer* grant to Donda Singh, the respondent's father, and his being seized thereof, they cannot recover possession, but are entitled to the rights and privileges of zumeendars. Such an award is not precluded by the miscellaneous orders passed by this Court, inasmuch as they were founded on the fact of the appellants never, up to that date, having established their title, as zumeendar, in a Court of Justice.

1828. As such a proprietary right on their part has in the two present cases been recognized, and sanctioned by the Court, there can be no inconsistency in such a course of proceeding. It appears however, from section 4, regulation 11, 1808, that the Court are not competent to enforce the payment of zumeendaree fees by invalid pensionaries, until they shall have been in the first instance adjusted by the Collector, in conformity with the provisions of the above enactment. We therefore reverse the decree of the Zillah Court, and direct the appellants to be furnished with a copy of the present order for transmission to the Collector, who shall fix and give them whatever they shall be legally entitled to receive from the respondent; and the latter shall in future continue to pay at the same rate, and defray all costs of the present action.

The Government *vakeel* subsequently filed in the Court of Sudder Dewanny Adawlut a *purwanna* to his address from the Superintendent of Government Law-suits, and a petition to the following effect.

The Collector, on receiving the order of the Court of Appeal, notified the circumstance to the Board of Revenue, who reported the matter to Government, and afterwards communicated with the Collector on the subject, declaring that regulation 11, of 1808, did not extend to Benares; that regulation 43, 1795, had not been rescinded; and consequently that the Court's award of *malikana* under regulation 11, 1808, was erroneous, and directed him to apply for a rehearing of the case. The Collector accordingly petitioned for a review on the 4th of August 1822, which was refused by the First Judge on the 17th of September following. The lands in dispute having been assigned in grant previous to the formation of the decennial settlement, and not included therein, Government are entitled, on the death of the grantee, to rent, and the zumeendar to *malikana* only; and moreover regulation 43, 1795, which had effect in Benares, was not rescinded by regulation 11, 1808, which did not extend there: he, therefore, now prayed that a special appeal might be admitted.

The Second Judge of the Sudder Dewanny Adawlut, (C. Smith,) to whom the application for a special appeal in this case was first submitted, considered that it ought to be allowed on the grounds, first, that regulation 11, 1808, did not extend to Benares; secondly, that the invalid *jageer* was conferred on Donda Singh, the father of Dhola Singh, previous to the decennial settlement, and consequently was not included in the permanent settlement; and also with reference to the reasons stated in the petition and in the letter of Mr. Secretary Mackenzie, dated 29th May 1823, communicating to the Board of Revenue in the central Provinces the orders of Government relative to the course of proceeding to be followed in the settlement of lapsed invalid *jageers* in Benares.

The Fifth Judge (W. B. Martin) concurring with Mr. Smith, a special appeal was admitted.

It was deemed expedient that Gopal Singh the appellant, and Dhola Singh the respondent, in the Provincial Court, should be associated as respondents on the present occasion, and a notification to that effect having been issued, both those individuals appeared, and pleaded separately.

The case came originally to a hearing before the then Second Judge, (C. Smith,) on the 7th of May 1827, who, on discovering that the miscellaneous orders of the Benares Provincial Court above adverted to had been passed with his concurrence, declined offering any opinion, and directed the papers to be laid before some other Judge.

The case was accordingly taken up by the Third Judge, (Mr. C. T. Sealy,) who after due consideration recorded the following judgment on the 19th of February 1828.

It is enacted by clause 12, section 2, regulation 43, 1795, that from and after the 24th of December 1790 A. D. the zumeendar, on the death of the grantee, shall be entitled to *malikana* and the revenue assessed on all lands assigned in grant to invalids. In the present instance the *sunnud* conferring lands on Donda Singh, father of Dhola Singh, was executed on the 8th of December 1789, antecedent to the 24th of December 1790, and the formation of the decennial settlement; and they were not assessed on the part of Government. On the death therefore of Donda Singh, Government are entitled to revenue, and Gopal Singh the zumeendar to *malikana*. From the tenor of the preamble to regulation 11, of 1808, it is obvious that that enactment does not extend to Benares. I am therefore of opinion that the decisions of the Zillah and Provincial Courts should be reversed.

The officiating Judge (M. H. Turnbull) concurring in the above opinion, a final order was passed accordingly.

MUSSUMMAUT HINGOO, Guardian of MURDAN ALI,
a Minor, Appellant

1828.

April 5th.

versus

MEER FURZUND ALI and MUSSUMMAUT
AMANEE, Respondents.

THE appellant instituted this suit in the Provincial Court of Patna, praying the Government to take possession of mouza Khoo-tubpoor and certain other lands in purgunnas Huwelee Behar and Huwelee Azeemabad, then in the possession of Meer Furzund Ali, and hold them for Murdan Ali till he should come of age. The suit was laid at 9,934 rupees, being eighteen times the value of the *lakhirjee*, and three times of the *khirajee* land.

The claim rested on two deeds executed by Keedarnath, the constituted agent of Meer Furzund Ali. The first was an *ikrarnama*, or declaratory deed, dated the 10th of Rubbee-ool uwuwul 1232 *Higeree*, (January 29, 1817,) in which was recited that Keedarnath, under the power delegated to him for that purpose by Meer Furzund, had sold all the litigated property to his son Murdan Ali for the sum of 20,000 sicca rupees; that he had given over possession to the purchaser, and had received payment in full of the amount of the purchase money. The second deed was also an *ikrarnama*, under date the 15th of Rubbee-ool uwuwul 1232, (3d February 1817,) A father, by two separate deeds, had sold all his property to his son, and made over to him the purchase money as a free gift. The provisions of the contract never having been carried into effect, and the sale be-

1828

wherein the circumstances of the sale were recapitulated, and it was acknowledged that Meer Furzund Ali had made a gift to Murdan Ali of the purchase money, and that there was nothing due. Both these documents were endorsed by Meer Furzund Ali, and duly registered in the Register's office by Keedarnath, under authority of the kind for that purpose. Shortly after this, Keedarnath presented a petition to the Collector, stating that the sale was fictitious and not real; was intended by Furzund Ali only as a threat to his two sons Syud Furhut Ali and Syud Jumal Ali, and had never been carried into effect. He therefore prayed that the change of names in the record might be stayed, and the estate continue in his own name. On April 16, 1817, an order was passed in compliance with the prayer of the petition, which was directed to be filed with the other documents regarding the estate. In another petition presented to the Register shortly after, the whole case was stated. The registry was declared to have been effected merely to preserve copies of the deeds, but that those very deeds were still in Meer Furzund Ali's keeping, and had never taken effect. Keedarnath therefore prayed that the fact of the deeds never having been carried into effect, might be certified by an endorsement on the registered copies. The order of the Judge, dated September 1st, 1818, directed the petitions to be filed with the registered documents, and no copies of the latter to be granted without being accompanied with a certificate of the above nature.

Such being the state of the case, the guardian of Murdan Ali sued to give effect to the deeds of sale and gift; filing copies of the registered deeds. On the other hand Meer Furzund Ali declared the whole transaction to have been fictitious, that it was only resorted to as a threat to his legitimate sons, who soon repented of their misconduct, and received his immediate pardon; that Murdan Ali was not his son, but the offspring of a dancing-woman, who had admitted many, beside himself, to her intimacy. In proof that the transaction had never been meant to take effect, he himself filed the original deeds, which he had never delivered over to the other party.

On a reference to Moohummud Jumal, the Cazee of the Provincial Court, he declared the transaction null and void both by common custom, and on legal grounds. By custom, because no man could have intended materially to injure his legitimate sons, who were living at the time, and whom he appeared rather to have threatened, than actually deprived of their rights. The legal exceptions were, that neither of the contracting parties appeared to have been present at the time of the execution of the deeds, and that the documents were contrary to the fact, inasmuch as the first declared a transfer to have been made, and a price to have been paid, which never did take place; and the second bestowed, as a gift, a sum of money which never had been delivered to the alleged donor, and was therefore utterly void as being the gift of what was non-existent. The Judge of the Provincial Court (W. M. Fleming) agreed in this view of the case, and accordingly dismissed the suit on July 5, 1823.

The plaintiff appealed to the Sudder Dewanny Adawlut, and on the 12th of December, 1825, the name of Mussummaut Amanee was entered amongst the respondents, as it appeared that Meer Furzund Ali had subsequently made over to her, his second wife, the whole of the litigated property as *mukif*, or a religious endowment.

On the 19th of March, 1828, the acting Judge, Mr. M. H. Turnbull,^{1828.}
put the following questions to Hamid Oollah, the Cazeeoolcuzzat,
one of the mooftees being then absent, and the other having for-
merly delivered an opinion on the case in the Patna City Court.
<sup>Museum
maut Hin-
goo v. Meer
Furzund
Ali, and
Museum
maut
Amange.</sup>

Question 1. Supposing Meer Furzund Ali's allegation to be correct, that the deeds of sale and gift were never carried into effect; the donee being then only four years old; are those deeds valid and binding, and is it necessary, in conformity with those deeds, to strip the respondent of all his property, and confer it on the appellant?

Answer. This sale is legally denominated *bye-i-tuljeerah*, which is void; and besides, in a sale by a father to his son, through the instrumentality of an agent, it is necessary that the father be present, and accept on the part of the son; which does not appear to have been done in the present case. The deeds are therefore invalid, and of course no transfer of property takes place under them.

On receipt of this *futva*, Mr. Turnbull recorded his opinion, that the whole transaction was fictitious, intended to answer a temporary purpose, and never carried into effect. As then the law officer had declared it to be legally invalid, he thought that no claim could be established on it, and therefore dismissed the suit, making the costs in both Courts payable by the appellant. (a)

(a) A *tuljeeah* sale is thus explained by the author of the *Noor-ool Unwar*, an Arabic Treatise on the principles of Mahomedan Law. In explaining the circumstances which bar the competency of a person to contract, he mentions, amongst others, *Hasl*, or jesting, and under that head remarks, " *Tuljeeah* means forcing, and may be defined to be the straining of a contract, so as to produce a different result from what it outwardly bears, so that the parties appear to the world to execute a sale, for some purpose which calls for it, whilst in fact no sale takes place between them. *Hasl* is a more comprehensive term, but the rule regarding both is the same, viz. that competency is conditional, and not necessarily destroyed. *Hasl* consists in this, that the contractors secretly agree that they should apparently execute a sale before men, whilst in reality no contract is formed. Should they, after such contract apparently made, differ regarding the previous agreement, one party holding that the contract was fictitious, and the other that it was *bond fide*, the correct opinion is, that the presumption is in favour of the former, and the sale is to be annulled. Vide *Noor-ool Unwar*, p. 331. Cal. ed. of 1818.

• 1828. •

NUFUR MITUR and RUJEEB MITUR, Appellants
versus
 May 6th. RAM KOOMAR CHUTTOORJYA and others, Respondents.

By the Hindu law a man cannot alienate an estate which she inherits from her son. On her death it goes not to her own heirs, but to the nearest surviving heir of her deceased son.

THE suit was instituted by the respondents as plaintiffs in the City Court of Moorshedabad, for possession of a 1 ana 11 gunda share of Kismut Mulyatee, the yearly proceeds of which were estimated at 105 rupees 13 annas. The case, as stated by the plaintiffs, was the following : a 1 ana 16 gunda share of Kismut Mulyatee had stood in the Collector's books, in the name of Mitrunjay Mitur, of which 1 ana 6 gundas belonged to himself, and 10 gundas to Kirte Chundur Mitur. The estate ultimately vested, thus : Teelook Chund Mitur and Rai Kishen Mitur divided their father's 10 gunda share between them, and each was seized of a 5 gunda share in *severalty*; whilst Ram Narain Mitur and Prem Narain Mitur held Mitrunjay their grandfather's 1 ana 6 gunda share in coparcenary, of which they jointly sold one half, i. e. a 13 gunda share, to Rai Kishen Mitur, who thus became seized of 18 gundas. On the death of the latter, his son, Gunga Govind, a minor, succeeded to his share, but dying shortly after, the estate came to his widow, Dhun Munnee, and on Prem Narain's death without issue, Ram Narain, his brother, inherited the 13 gunda share, which they had formerly held together. Dhun Munnee gave her 18 gunda share to her daughter's son, Manik Lall, and Ram Narain gave his 13 gunda share to Nub Kunt Biswas, who subsequently sold it to Gholam Basit. However, on the 19th of Poos 1223 F. S. Dhun Munnee, with the concurrence of Manik Lall and Nub Kunt Biswas, executed a deed of sale, by which she conveyed the two shares, in all 1 ana 11 gundas, to Domun Chuttoorjya, the father of one, and uncle of another of the plaintiffs. Under this sale Domun Chuttoorjya held possession for a year; but on his death, the plaintiffs were ousted by the sons of Teelook Chund, the defendant, and brought their suit accordingly. Many material points in this statement were disputed by the defendants. They asserted that their father, Teelook Chund, and their uncle, Rai Kishen, held the 10 gunda share, which they inherited from Kirte Chundur, in coparcenary; that they jointly purchased the 13 gunda share from Ram Narain Mitur and Prem Narain Mitur; that, on Rai Kishen's death, Teelook Chund managed the whole 1 ana 3 gunda share for himself, and on account of Gunga Govind the son, and Dhun Munnee the widow, of his deceased brother, and, on the demise of the former, on account of the widow; that Ram Narain, before his death, had made over the remaining 13 ana share to themselves, as the only surviving members of the family; and that neither Nub Kunt Biswas, Manik Lall, or Domun Chuttoorjya ever had possessed any part of the estate, but that the whole had been in their possession ever since it had vested in them by the death of the former proprietors. They also demurred to the legality of the deeds of gift and sale, said to have been executed by Dhun Munnee; such acts being pronounced by the *shasters* beyond the competency of a widow.

The Judge of the City Court referred the point of law to the Pundit of the Court; and on his declaring the sale valid, a decree

was passed in favour of the plaintiffs. On appeal to the Provincial Court, the *vyavustha* of the Pundit of the City Court was referred to the Hindoo law officer, and he was called upon to decide as to its correctness. He objected to the validity of the sale, on the ground of the previous gift to Manik Lall, and the share which the appellants seemed to have in the property conveyed. Both these objections were overruled by the Judge of Appeal, who decided that Manik Lall's consent was apparent, and that the appellants appeared to have no interest in the property. He therefore affirmed the decree of the City Court, with full costs against the appellants.

Against this decree, a special appeal was preferred by the appellants to the Sudder Dewanny Adawlut, on the ground of the discrepancies in the *vyavusthas*, and the variance between the *vyavustha* and decree in the Provincial Court. The appeal was admitted by the then Second Judge, (C. Smith,) and the case came to a hearing on the 13th of March, 1828, before the Third Judge (C. T. Sealy). After going through the whole case, he put three questions to the Pundit of the Court: First, whether the gift of Dhun Munnee to Manik Lall was valid: secondly, whether the sale subsequently executed by her was also valid; or, if not, who were entitled to the estate which she had held: thirdly, whether, if Dhun Munnee were alive, she would have any right to the property.

To the first question the Pundits replied, that on Rai Kishen's death the right in the estate vested in his son, Gunga Govind, and that Dhun Munnee succeeded as nearest heir to her son, and not as widow of her husband; that the right which a mother had in property inherited from her son, was the same as that which a widow had in property inherited from her husband: and that, therefore, she was incompetent to alienate that property by gift. They cited the following authorities for this *vyavustha*.

The *Mahabarat*, quoted in the *Daya Bhaga*, and other works: "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth." The *Daya Rahasya* explains "waste" to mean gift or sale at pleasure.

The *Daya Bhaga*. "The word *wife* is employed with a general import; and it implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

In reply to the second question they declared, that the sale also was invalid, because the deed expressly stated the sale to have been executed by Dhun Munnee at her own pleasure; whereas the *shasters*, as above quoted, prohibited sale at pleasure, and only licensed it under unavoidable necessity, which did not here exist. As then both the gift and sale were invalid, the succession to the estate would be regulated by the analogy of the case of a widow, that is, as the nearest surviving heir of the husband inherits from the widow, so the nearest surviving heir of the son would inherit from the mother. The estate would not therefore go, on her death, to her daughter's son, Manik Lall, who was not an heir of Gunga Govind, from whom she inherited, but to his nearest surviving heir, who happened in this case to be the appellants, the sons of his father's brother. Authorities, in addition to those above quoted.

Srikrishna Terculanacara, in his Commentary on the *Daya*.

1828.

Nufur
Mitir and
Rujeeb
Mitir, v.
Ram Koo-
mar Chut-
toorjya and
others.

1828. *Bhaga*: "On failure of him, the grandfather, then the father's half brother, then the son of the father's whole brother, then the son of the father's half brother, &c. (each succeeds on failure of the preceding.)" Nufur, Mitur and Rujeeb On the third point referred to them they declared, that if Dhun Mitur, v. Munnee were living she would certainly have a right to the property, Ram Koo-mar (but been voided by the gift or sale, both of which she was incompetent to make.

Mr. Sealy considered this *vyavvustha* decisive as to the right of the appellants to the 18 gunda share, which had belonged to Dhun Munnee; and he also awarded them the remaining 13 ana share, said to have belonged to Nub Kunt Biswas, as the title to both shares was conveyed in the same deed, which he considered a collusive action to deprive the appellants of their right; and because, in a former suit, Nub Kunt Biswas was said to have disposed of his interest to Gholam Basit. On these grounds he gave it as his opinion, that the decrees of both the City and Provincial Court should be reversed, and the whole 1 ana 16 gunda share be awarded to the appellants, with costs in the three Courts, and meane profits since their dispossession under the previous decrees.

Mr. R. H. Rattray concurring in this view of the case, a final decree was passed accordingly on the 26th of May 1828.

1828.

August 9th.

SHAH UZEEZOOLLAH, pauper, Appellant
versus

The COLLECTOR of SEHARUNPOOR, on the part of
GOVERNMENT, Respondent.

Certain lands in zillah Seharunpoor were claimed to be held rent-free, in virtue of two muddas granted by Madho Rao Scindia, one of which, dated 29 Zee-kad, 27. Ju-loo, conferred the mouza in question as muddud-mash on Shah Abdoollah,

THIS was a suit instituted by the appellant *in formâ pauperis*, on the 19th of July 1824, in the Provincial Court of Bareilly, to recover the mouza of Poor, a rent-free village in purgunka Junjanah, zillah Seharunpoor. The suit was laid at 72,000 rupees, eighteen times the annual produce.

The plaint originally filed by the appellant was rejected by the Senior Judge of the Bareilly Court, on the ground that the orders of the Board of Commissioners, directing the attachment of the village in question, were issued prior to the enactment of regulation 2, 1819, and that the plaintiff had failed to bring his action, as required by regulation 8, 1811, within six months from the attachment. This was overruled by the Sudder Dewanny Adawlut, and the Court of Bareilly directed to try the case under section 24, regulation 2, 1819.

The plaint set forth, that the village in question was long since conferred on the plaintiff's father, "Shah Abdoollah, and other fukeers," as *muddudmash*, by a grant from Maharajah Madho Rao Scindia; in virtue of which it had been held rent-free by the grantee, and since by the plaintiff; and that it was attached by the

Collector of Seharunpoor, acting under the orders of the Board of Commissioners, dated 12th of March 1819, which were grounded on the idea of the mouza being a *jageer*, while in fact it was, as could be proved by the *sunnud* adverted to, a *muddudmash* grant. 1820.

The defendant contended in reply, that the grant produced at his office, as the original *sunnud* of Madho Rao Scindia, bore out the claim of Government, and refuted that of the plaintiff. In the first place, the *sunnud* did not contain the word "muddudmash," or any other expression which would countenance the construction of a rent-free tenure in perpetuity, now attempted to be made. Secondly, a *purvanna* existed in favour of one Imam Buksh Khan. Thirdly, the plaintiff was unable to shew his relationship to any of the original grantees, who were all dead, and was therefore clearly not entitled to claim the mouza in dispute.

The maufeedars had produced a document, signed by General Perron, and another by Nownidh Rai, to confirm their right to the rent-free tenure: but when compared with each other, they were contradictory and inconclusive; for the *sunnud* of Madho Rao Scindia had no specification of tenure, and was in favour of Shah Abdoolah, Hamid Oollah, and others. The *purvanna* of General Perron was for an *alymgha jageer* in favour of Khoorum Shah and others; while that of Nownidh Rai, in favour of Abdoolah and others, specified a *muddudmash jageer*. From the depositions of the local zumeendars and canoongo, and from the *jumma wasil bacee* accounts for purgunna Junjanah, from 1206 to 1212 *Fuslee*, (previous to the accession of the Company to this part of their territory,) it appeared, that the estate in dispute was granted as a rent-free *jageer* for life. It could not, therefore, on the death of the grantee, be claimed by his heirs at law. Under this impression the Governor General in Council had directed the attachment of this mouza.

There was also a consideration independent of these, namely, the time which had been suffered to elapse before the suit was brought into Court, a period of more than thirteen months, by which the case was rendered incognizable by a court of law. He (the defendant) contended that the Sudder Dewanny had erred in directing the hearing of the case. For the regulation referred to, though enacted in February 1819, only reached the Collector's office at Seharunpoor on the 29th of April of that year, nearly two months subsequent to the receipt of the orders from the Board of Commissioners, directing the resumption of the mouza. The *sunnud* of Madho Rao Scindia, dated 19th Zeekad, 27 *Juloos*, was evidently a forgery. For notifications had repeatedly been issued to the maufeedars, calling on them to produce all their title deeds at the Collector's office. Neither the plaintiff, however, or his relations, had ever produced the *sunnud* in question, though they did submit the *sunnud* of Madho Rao Scindia, dated 8th Shaban, 32 *Juloos*. It was therefore presumable, that, at that time, the *sunnud* purporting to have been executed by Madho Rao Scindia, on the 29th Zeekad, 27 *Juloos*, was not in existence, or they would not have failed to produce it. Besides this it had never been registered, nor was any copy of it extant in the Collector's office.

Judgment was given in this case in the Bareilly Court, on the 8th Sha-

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1828. 15th of June, 1825, against the plaintiff, on several grounds: first, the orders of the Governor General in Council, passed after mature deliberation on the case: secondly, the circumstance that of the *sunnuds, purvannas, &c.* produced, none contained any word which could be interpreted into an hereditary signification: thirdly, the *sunnud* under which the plaintiff professed to hold, viz. that dated the 29th of Zeekad, 27 *Juloos*, had never been produced at the Collector's office, and it could not therefore, by clause 2, section 13, regulation 2, 1819, be received by the Court in evidence. The Bareilly Court therefore dismissed the suit with costs.

Appeal was made to the Sudder Dewanny Adawlut, and came to a hearing before the Second Judge, (C. Smith,) on the 21st of July 1827, who recorded his judgment as follows.

This Court has decided, on a former occasion, that the present case could be heard under regulation 2, 1819. The arguments of the respondent therefore on that head are inadmissible. The provisions of clause 2, section 13, regulation 2, 1819, do not, as imagined by the Bareilly Court, apply to the case; for the orders in Council, directing the resumption, were issued in February 1819, before regulation 2 of that year, which was only received in this Court on the 14th of April 1819, and could not therefore have been printed at the time of issuing the said orders. That regulation, therefore, not being in force at the time of the attachment, it follows that the attachment was made under regulation 8, 1811. But by the latter regulation it is required, that, previous to resumption of any lands, all the arguments of the *maufedars* shall be heard, and all the documents submitted for the consideration of the authority, with whom the decision of the question, in such cases, rests. Now it is evident that this has not been done in the present case; for we find the Collector apprized, in an *urzee* from Ubdoole Jubbos, Gholam Hosen, and Mahmood Shah, of the existence of another document, a *sunnud* of Madho Rao Scindia, dated 29th Zeekad, 27 *Juloos*, in the *serishtah* of the Bareilly Court, a statement confirmed by the Judges of that Court themselves. According to regulation 8, 1811, the Collector should have obtained and forwarded this document, for the consideration of the Governor General in Council; but this had not been done. Had it been so, the result might have been very different. For amongst the reasons assigned for the attachment, we find it stated, that "in the *sunnud* dated 8th Shaban, 32 *Juloos*, no word could be found signifying either *altumgha, jageer, or muddudmash*; and although the *purwanna* of General Perron specified *jageer altumgha*, yet Perron, a servant of the rajah, was not competent to supersede the rajah's *sunnuds* by his own, by altering and extending the original tenure." Again, that "the *purwanna* of Nownidh Rai, which is for *jageer muddudmash*, is invalid, being executed in the very year of the accession of the British Government to this part of their territory."

But the *sunnud*, which was kept back from the consideration of the Government, expressly specified that, with some exceptions, the entire *mouza* Poor was conferred as *muddudmash* on "Shah Abdool-lah and others." The *sunnud*, dated 32 *Juloos*, corroborated and confirmed that of 27 *Juloos*. The last being intended to confirm, fix, and specify what the first had already done in general terms.

The *Canoongo* of the *purgunna* had deposed before the Collector that a *maufee* grant of mouza Poor was first made in 1191, or 1192, *Fuslee*, which corresponds with 27 *Juloos*. Had the first *maufee sunnud* been given in 32 *Juloos*, the *Canoongo* would have stated that it was granted in 1197, or 1198, *Fuslee*.

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The zumeendars of mouza Poor had also deposed before the Collector, in the year 1226 *Fuslee*, that, about thirty-four years previous to the date of their evidence, the mouza had been granted as *maufee* to Shah Abdoolah. Deducting these thirty-four years from the year 1226, F. S. when they gave their evidence, we arrive at the year 1192 F. S. which agreed with the date of the grant made in 27 *Juloos*.

It was presumable, therefore, that General Perron confirmed the *maufee* in his *purvanna*, with reference to the original *sunnud*, and not the one dated in 32 *Juloos*. Shah Abdoolah, the original grantee, died a few years before the Company obtained possession of that part of India; and on his death, the inheritance was confirmed to his descendants, who were in possession when the Company first extended their authority in that direction. This Government has consequently nothing to do with the question of succession, which had been previously determined by the proper authorities of the time. Whether the *sunnud*, dated in 27 *Juloos*, were registered or not, in conformity with regulation 36, 1803, I do not think that the mere fact of its non-registry must necessarily cause a resumption and assessment of the lands. For section 21 of that enactment does not declare that lands of this description, the grants of which are not registered, must *ipso facto* necessarily be assessed; but it merely states, that in such cases the grants shall be "subject" to resumption, and the lands "liable" to the payment of revenue to Government. In the present instance, it was incumbent on the Collector, and Board of Revenue, to have mentioned in their report the existence of the *sunnud* dated in the year 27 *Juloos*, and the nature of it, and whether it had or had not really been registered, in order that Government might have had before them all the facts and circumstances of the case, before they passed any orders upon it. It has been seen, then, that the grant was hereditary, that heirs of the original grantee exist, and that the order for resumption was informal. I consider these grounds sufficient for a reversal of the decree of the lower Court, with costs.

The Third Judge (C. T. Sealy) differed *in toto*, and would affirm the decree of the Bareilly Court, as, regulation 36, 1803, clearly declared that failure to register a grant was to be followed by resumption of the lands. The *sunnud* under which the appellant professed to hold was not registered within the time prescribed, and the mouza should be resumed and assessed.

The case was next brought before the Fifth Judge, (A. Ross,) who deemed it necessary, before he came to a decision, to see the register of rent-free lands kept under regulation 36, 1803; also the notification issued under regulation 7, 1808, requiring the holders of all such lands to register them within one year. These documents were accordingly called for, and duly submitted.

In the periodical Register above-mentioned, mouza Poor, in pur-

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Juhjanah, was found registered as a *muddudmash* tenure, conferred by Madho Rao Scindia on Shah Abdoollah, and other fukeers, on the 29th of Zeekad, in the 27th year of the emperor's reign, and the title deeds found registered were, 1st, a *purwan-na*, bearing the seal of Madho Rao Scindia, dated 8th Shaban, 32 *Juloos*: 2d, a *purmannna*, bearing the seal of General Perron, dated 19th Rubbee-ool-uwul, 42 *Juloos*: 3d, a letter, bearing the seal of Nownidh Rai, Dewan of Zeboonisa Begum, and written by her order, dated 28th Jummadee-oos-Sanee, 1218 *Higeree*.

The case was again brought before Mr. Ross, on the 12th of July 1828, who laid the *sunnud* of Madho Rao Scindia, dated 8th Shaban, 32 *Juloos*, before the law officers of the Court, and required them to state what, from the general tenor of that document, particularly with reference to the words "*and others*," they considered to be the intent of the grantor; whether it was to make a grant of mouza Poor in perpetuity, or only for the life-time of the persons specified by name in the *sunnud*.

The law officers, in reply, declared that from the *purwanna* of Madho Rao Scindia, dated 8th Shaban, 32 *Juloos*, which stated, that "the grant of mouza Poor was confirmed to Shah Abdoollah, Shah Hamid Oollah, *and others*, and prohibited the officers of Government from offering any opposition," it was presumable, that mouza Poor was conferred as "*sudkah*," or for charitable purposes, and that the grant was intended to be in perpetuity.

On the 9th of August 1828, the Fifth Judge, (A. Ross,) adverting to the above exposition of the intent of Madho Rao Scindia's *sunnud*, which had been duly and legally registered, as well as to the circumstance of the grantees and their descendants having been uninterruptedly in possession of mouza Poor, till its resumption by Government, concurred with the Second Judge in reversing the decree of the Provincial Court, with costs.

The appellant, and the other heirs of the late Shah Abdoollah were directed to be reinstated, and maintained in possession of mouza Poor, as a rent-free tenure in perpetuity, and were awarded mesne profits from the date of its attachment. (a)

(a) An application for a review of judgment was filed on the part of Government, and rejected by Mr. Ross.

The following were the pleas on which the application was made, and the reasons recorded by Mr. Ross for rejecting them.

The first plea was, that the two Judges who had reversed the decree of the lower Court had formed their judgment on different grounds; one of them (Mr. Smith) being of opinion that the *sunnud* of Madho Rao Scindia, dated in the year 27 *Juloos*, supported by the evidence of the local Canoongees and Zumeendars, was sufficient, though unregistered, to warrant a judgment in favour of the appellant, without the *sunnud* dated in the year 32 *Juloos*; and being also of opinion that the *puruan-na* of General Perron was invalid with reference only to the first of those two *sunnuds*; whereas the other Judge (Mr. Ross) had put the first *sunnud* aside, and founded his opinion on the second. It was therefore contended, that there was not that unanimity in the two Judges, who had decided on the appeal, which was required to give validity to their judgment.

The reasons recorded by Mr. Ross for rejecting this plea were, that his opinion, as to the grant of mouza Poor having been intended by the grantor to be perpetual, was grounded, first, on the periodical register of rent-free lands, produced from the Collector's office, in which the said mouza is described as a *muddudmash* tenure, held in virtue of a grant from Madho Rao Scindia,

dated 29th Zeekad of the year 27 *Julos*, to Shah Abdoolah and other fukeers; secondly, on the obvious meaning of the *sunnud* of the year 32 *Julos*, which *sunnud* had been registered, in the mode prescribed by the regulations; and Shah Usseg thirdly, on the fact of the grantees having enjoyed possession of the mouza apollish v. under the above-mentioned *sunnuds*, and of its having been continued to their successors by the *purwanna* of General Perron: that his opinion, forged on top of these grounds, (viz. that Madho Rao Scindia, in the year 27 *Julos*, granted the harunpoor, rent-free tenure of mouza Poor in perpetuity to the appellant's predecessors, and confirmed the grant by a *sunnud*, dated in the year 32 *Julos*,) did not differ from the opinion recorded by Mr. Smith; but on the contrary, being supported by the evidence of the periodical register, in addition to the evidence which was before Mr. Smith, was confirmatory of that Judge's opinion. It was further observed by Mr. Ross, that the circumstance of the two deciding Judges having concurred in the same opinion on different grounds, those grounds not being contradictory, could not be considered as invalidating the decree passed by them.

The second plea urged was, that the *sunnud* bearing date the 29th Zeekad of the year 27 *Julos*, not being admissible as evidence, it not having been registered, the *sunnud* of the year 32 *Julos* could not avail to establish a grant in perpetuity, because the appellant himself had acknowledged that he did not register the last-mentioned *sunnud*, and because, moreover, that *sunnud* contained no expression which could be construed as conveying a grant in perpetuity; the words "and others," which the law officers of the Sudder Dewanny Adawlut understood as denoting the intention to confer a *sukkah*, or grant for charitable purposes, not warranting such an interpretation, for no expressions so indefinite were ever used in royal *sunnuds*, which were always drawn up with great care, and in language leaving no room for doubt as to the nature of the grant intended to be conveyed.

The reasons given by Mr. Ross for rejecting this plea were, that although the appellant had acknowledged he did not register the *sunnud* of the year 32 *Julos*, he had stated that it was registered by Abdool Haleem and his partners; and the fact of its registry, in conformity with regulation 7, 1808, had been ascertained by a reference to the periodical register; that therefore this *sunnud* was admissible as evidence; and being confirmatory of the grant made in the year 27 *Julos*, the *sunnud* for which, as the periodical register shewed, was expressed in the terms generally employed to confer a permanent tenure, and containing the words "and others," from which the intention of perpetuity was clearly inferrible, it was good evidence of the grantor's intention to confer a permanent tenure, although the terms used in original *sunnuds* to denote such intention were not found in it.

The third plea urged in support of the application was, that the instrument, bearing date in the year 27 *Julos*, even had it been registered, would not have been sufficient to support a claim to a rent-free tenure in perpetuity, it being merely a *purwanna* to the officers of purgunga Junjanah, from Madho Rao Scindia, who, at the time of its issue, viz. 29th Zeekad of the year 27 *Julos*, (corresponding with the 4th of October, 1785 A. D.) was not sovereign of the province of Seharunpoor, and therefore not competent to make any grant; the supreme authority in the said province being then exercised by the Nuwab Zabith Khan, from whom, had the *muddudmash* grant in question been really made, the *sunnud* for it would have been obtained.

This plea was also deemed insufficient by Mr. Ross. It was, he observed, recorded in the History of India referred to by the applicant, that Madho Rao Scindia took possession of Delhi in January 1785 A. D. that he then occupied nearly all the provinces of the Doab, which did not belong to the Nuwab Vizeer of Oude, and that he meditated the subjugation of the whole Delhi empire. Such being the case, there was nothing improbable in the supposition, that, with a view to conciliate the inhabitants of the country, and to facilitate its subjugation, Scindia made the grant of the year 27 *Julos* to the appellants, although his authority in Seharunpoor was not then established. It was doubtless true, that he had not at that time effected the subjugation of the empire; but in 1788 A. D. after he drove Gholam Kadur from Delhi, his sovereignty over all the provinces then subject to the emperor, of which Seharunpoor was one, was as fully acknowledged, as that of the British Government is at the present time; and, after that year, he was unquestionably competent to confirm, as he did by his *sunnud* of the year 32 *Julos*, (corresponding with 1790 A. D.) the grant he had made in the year 27.

1828.
Nov. 18th

PURMANUND BHUTTACHARUJ, Guardian of KISHEN-NATH CHOWDREE, Minor, Appellant
versus
 OOMAKUNT⁴ LAHOREE and others, Respondents.

A woman was authorized by her husband to adopt an individual named, or, in the event of any bar to his affiliation, any other Brahmin's son. The individual named was adopted by her, and died some years afterwards. Held, that she was incompetent, under the terms of the authority given, to make a second adoption.

THIS action was brought in the Provincial Court of Dacca by the respondents, sons of Gouree Dibia, to gain possession of a four ana share of purgunna Mymunsingh, and other lands situate in zillah Mymunsingh, late the property of Hurnath Chowdree, deceased. The lands were valued at 92,287 rupees, 6 annas, 4 gundas, three times the amount of the Sudder *jumma*.

Gunga Narain Chowdree, zumeendar of the above property, died in 1183, B. S. leaving a son, Hurnath Chowdree, and a daughter, Gouree Dibia, mother of the respondents. Hurnath Chowdree died childless, on the 3d of Cheyt 1199, B. S. but previous to his death executed two deeds, conveying to his wife Gunga Dibia a limited permission to adopt a son. The first document was an *anoomuttee-purtur*, dated the 23d of Phalgoon 1199, to the following effect: "This deed is addressed to the fortunate Gunga Dibia. I am in so weak a state that my life is very uncertain; and I have no son: I therefore authorize you, should I be removed, (which God avert,) to adopt Sheb Kishore Surma, second son of Joogul Kishore Roy, in order that he may perform my funeral rites, and preside over my estate. I have written to Joogul Kishore on the subject; but should he refuse his consent, you may adopt the son of some other Brahmin. Such adopted son shall in that case perform my funeral rites, and inherit my estate." Below the signature was written, "I have authorized her to adopt a son." The second document was confirmatory of the former, and was dated the 2d of Cheyt in the same year. It also was addressed to Gunga Dibia, and ran thus: "On the 23d of Phalgoon, in consideration of my being childless, and in a dangerous state of health, I gave you authority to adopt Sheb Kishore Roy, and wrote to Joogul Kishore to authorize the gift of his son. Since that, Joogul Kishore has deputed his wife, Rudrance Dibia, to give his son in adoption. I accordingly adopt him as my son. If I recover, I will myself perform the prescribed rites; but if it should please God to remove me, I hereby empower you to perform the ceremonies. The investiture of the brahminical thread must be performed by Joogul Kishore, or his son Hur Kishore. Sheb Kishore will be the lawful possessor of all my wealth." On the day following the execution of this deed, Hurnath died; and Sheb Kishore was adopted by Gunga Dibia, and obtained undisputed possession of the zumeendaree. He died childless on the 15th of Bysack 1213; and Gunga Dibia then held the estate. In 1227 she went to Moorshedabad to bathe in the Ganges, and there suddenly died of the cholera morbus, on the 25th of Cheyt. On the day previous, however, she was said to have adopted Kishennath Chowdree, under the general authority given by her husband. The Collector and Board of Revenue recognized the adoption, and the respondents brought their suit to set it aside in the Provincial Court of Dacca, against Kishennath Chowdree, and his abettors, Kalee Mohun Thakoor, Ramnath Moonshee, and Sheonath Moonshee. They claimed the estate as the natural heirs of Hurnath Chowdree.

On the 15th of March 1825, C. W. Steer, Fourth Judge in the Provincial Court, gave judgment in the case. He observed that there were two disputed points; viz. the competency of the widow to adopt Kishennath, and the fact of the adoption; but that a negative on the former set at rest the latter point. He considered the widow incompetent to adopt, because the *anoomuttee-putur* gave her authority in a specific case, making the general authority contingent on its non-performance; so that as soon as she had adopted Sheb Kishore, the authority granted to her was annulled; because the words under the signature, "I have authorized her to adopt a son," implied that there was no authority to adopt more than one son; because there was no necessity (as alleged by the defendants) for the adoption of a second son, on the death of the first, in order to perform the funeral rites; as it was notorious, that the death of an only legitimate son, without issue, never empowered the widow to adopt, unless under special authority from her husband; because the confirmatory deed, under date the 2d of Cheyt, clearly restricted the authority to Sheb Kishore; and because Gunga Dibia was proved to have frequently expressed her conviction that she had no authority to adopt a second son. There was also strong presumption against the fact of the adoption. Sheb Kishore died on the 15th of Bysack 1213, and Gunga Dibia on the 25th of Cheyt 1227; so that the widow had neglected what the deed of adoption in favour of Kishennath declared to be a sacred duty, for the term of fifteen years. It was usual to perform the adoption in one's own house, amongst one's own relations, and to select some one known to the family; but Gunga Dibia was said to have journeyed to a distance from home, and there, amongst strangers, in a strange land, to have adopted, on the day previous to her decease, an individual of whom she could have known nothing, till a short time previous to her decease. On these grounds possession of the estate was decreed to the plaintiffs, as legal heirs of Hurnath, deceased.

Against this decision Kishennath appealed to the Sudder Dewanny Adawlut; and on the 18th of November the case came to a hearing before R. H. Rattray. He was of opinion that the adoption of Kishennath was not proved, but that the whole transaction was a fraud of Kalee Mohun Thakoor and his associates; and that, even if it had been proved, it could be of no benefit to the appellant, inasmuch as it was illegal without the sanction of her husband, which, both by her own deposition in a former case, and Hurnath's papers produced in this, it as evident never was given, or intended to be given; that the power conferred by Hurnath was explicitly confined to the son of Joogul Kishore, Sheb Kishore, or, if the father were unwilling to give his son in adoption, the son of some other Brahmin; that there was not a word in relation to repeated adoption at the widow's pleasure, in the event of casualty to the first adopted son; and that, without a distinct permission, she could not of herself do that legally, which it had been attempted to prove she did do. On these grounds Mr. Rattray affirmed the decree of the Provincial Court, awarding possession of the estate to the respondents, and making the costs of both Courts payable by the appellant.

1828.
Purwa,
and Bhut-
tacharuj, v.
Oomakunt
Lahores
and others.

DEBEE DIAL and MUSSUMMAUT KHULASSEE,
Appellants
versus
HUR HOR SINGH, Respondent.

A woman, after her husband's death, is incompetent to give her only son in adoption, as a *duyamushayana*, without authority previously given by her deceased husband.

THIS action was brought by the appellants in the City Court of Benares, to recover possession of a brick house, valued at 1,100 sicca rupees. Debee Dial was the son, and Mussummaut Khulasee the widow, of Ram Newaz Roy, deceased, and sued for the house as his heirs. Hur Hor Singh held it as part of the share of the estate, to which he was entitled as adopted son of the deceased. It appeared that Ram Newaz Roy had lost all his children by his first wife, and that he then took his paternal uncle's grandson, Hur Hor Singh, as his *ras nusheen*, or adopted son. From that time the respondent lived with him, had the superintendence of his affairs, had been married at his expence, and, at the marriage ceremony, had been named by the officiating brahmins as his son. Ram Newaz Roy subsequently married Mussummaut Khulasee, and left Debee Dial, his son by her, a minor at the time of his death. In the City Court the case turned on the fact of the adoption, which the Judge (Mr. W. W. Bird) considered proved, and dismissed the suit, leaving the plaintiffs at liberty to sue for a partition of the estate, if they considered the house in possession of the defendant more than he was legally entitled to.

In the Provincial Court the appellants demurred to the legality of the adoption, and filed a *vyuvustha*, signed by a number of Pundits, in which three objections to the validity of the adoption were stated.

- 1st. That Hur Hor Singh was the only son of his father.
- 2d. That he was given in adoption by his mother, after the death of his father, without any authority for such an act.
- 3d. That the prescribed ceremonies were not duly observed at the time of the adoption.

These facts were not disputed by the respondent, and the case was referred to the Court's Pundits for their opinion. They replied, that the fact of Hur Hor Singh's being an only son was sufficient to invalidate the adoption, as such a person was forbidden to be adopted; and the violation of this law was a criminal act on the part of both giver and receiver. In bar to this, the respondent filed another *vyuvustha*, signed by very respectable Pundits, from which it appeared, that when a mother, from the pressure of want, gave her only son to another person, on the special conditions, that her son, thus given, should perform the funeral rites, and inherit the estates of both his natural and adoptive father, the adoption was valid, and the adopted son was called a *dravyamushayana*.

The presiding Judge (W. Gorton) referred this *vyuvustha* to the Court Pundits, and required them to pronounce on its correctness or otherwise. They replied, that the transaction, as stated by the defendants, was legal, and the adoption under those circumstances valid. Upon this *vyuvustha*, Mr. Gorton decided, that though there was no express evidence to the execution of a contract, such as de-

CASES IN THE SUDDER DEWANNY ADAWLUT.

scribed by the defendants, yet that there could be no doubt of the adoption, and of its having been long recognized, which afforded sufficient presumption of its having been legally performed. He therefore affirmed the decree of the City Court, and made all the costs payable by the appellants.

From this decision the appellants preferred a special appeal to the Sudder Dewanny Adawlut, on the grounds of the inconsistency of the facts proved by the evidence, with the case hypothetically put by the defendants. The appeal was admitted by the Second Judge, (C. Smith,) and on the 24th of January 1828, the case came to a hearing before the Third Judge (C. T. Sealy). The respondent, though repeatedly summoned, failed to appear or defend his case, and the proceedings were therefore held in his absence. After going through the documents in the case, Mr. Sealy referred them to the Hindoo law officers, for their opinion as to the legality of the adoption under the circumstances there proved. The *vyavustha* they gave was to the following effect: "It appears that Hur Hor Singh was the only son of his father, and that, after his father's death, he was given by his mother as a *dattaca*, son, that being the meaning of the term *Ras nusheen*. Such being the case, the adoption of Hur Hor Singh by Ram Newaz Roy is invalid, because the adoption of an only son is prohibited in the *shasters*, and because a woman is prohibited from giving her son in adoption, without the permission of her husband. The *vyavustha* filed by the respondent in the Provincial Court, as confirmed by the Pundits of that Court, declares that if a woman, unable to support her only son, were to give him away, on condition that he should perform the funeral rites for both fathers, such son would become a *dryamushayana*. But this is inapplicable to the present case, because in all the documents there is no mention of such a stipulation, and because there is no precept in the *shasters* which enables a woman to give her son as a *dryamushayana*, without authority from her husband, and no authority appears to have been given in this case."

Authorities :

The *Mitacshara*. "He who is given by his mother with her husband's consent, while her husband is absent, or after her husband's decease, or who is given by his father, or by both, being of the same class with the person to whom he is given, becomes his given son, (*dattaca*.) So *Menu* declares: "He is called a son given, (*datri-ma*), whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress, confirming the gift with water." By specifying "distress," it is intimated, that the son should not be given unless there be distress. This prohibition regards the giver. So an only son must not be given. For *Vashista* ordains, "Let no man give or accept an only son." Nor, though a numerous progeny exist, should an eldest son be given; for he chiefly fulfills the office of a son; as is shewn by the following text: "By the eldest son, as soon as born, a man becomes the father of male issue" (a).

The *Dattaca Mimansa*. "By a man destitute of a son," &c. From the masculine gender here used, it follows that a woman is incom-

(a) Vide Colebrooke's *Mitacshara*, & i. sec. 11. para. 9. p. 307.

Debee Dik
and Mu...
summant
Khulans
t. Hur Hor
Singh.

1828. Debee Dial and Mus. summaut Khulaasee e. Hur Hor Singh. present (to adopt.) Accordingly *Vasishta* ordains, "Let not a woman either give or receive a son in adoption, unless with the assent of her husband." (b)

The text of *Saunaki*, as quoted in the *Dattaca Mimansa*, *Dattaca Chandrika*, and other treatises: "By no man, having an only son, is the gift of a son to be ever made. By a man having several sons, such gift is to be made on account of difficulty" (or anxiously). (c)

This *vyavustha* appeared decisive to Mr. C. T. Sealy, against the legality of the adoption; and he therefore delivered his opinion, reversing the decrees of the City and Provincial Court, and awarding possession of the disputed house to the appellants.

The case was referred for the opinion of another Judge, and on the 29th of December came before the Chief Judge, (W. Leycester,) who took the same view of the case, and passed a decree accordingly, making the costs in all three Courts payable by the respondent.

1829. KUMLA KAUNT CHUKERBUTTY, Guardian of RAJAH SHUSHEE BHOOSUN Roy, Minor, Appellant

versus

GOOROO GOVIND CHIOWDREE, son of GUNGA GÖVIND CHOWDREE, deceased, KISHENPERSHAD NUNDEE, and MUSSUMMAUT RAJRAJESUREE DIBIA, deceased, Respondents.

A zumeen-dar in Bengal sold part of his ancestral estate to his mother for her maintenance, on condition of her binding herself not to alienate the property, but leave it to his son on her death. Held, that such a transaction did not terminate the zumeen-dar's right in that property, or bar p. 166.

THIS suit was first brought on in the Moorshedabad Provincial Court, on the 30th of July 1811, by Mohun Chund Deb Roy, father of the appellant, for possession of turuf Shujah Nuggur, zillah Rajeshahye, the yearly proceeds of which were 7,000 sicca rupees. The plaint contained the following statement: Ram Shunkur Roy, the plaintiff's father, supported his mother, Rajrajesuree, by a pecuniary allowance out of his zumeendaree. In consequence of some irregularity in the payment, Mussummaut Rajrajesuree proposed, that turuf Shujah Nuggur should be assigned for her maintenance, on condition that she should have no right to alienate the said turuf. Ram Shunkur Roy consented to the arrangement, and in Cheyt 1206 B. S. three deeds were executed to carry it into effect. One of these was a deed of sale, by which the zumeendar sold the said turuf to Kishenpershad Nundee, Rajrajesuree's Dewan; the other two were *ikrarnamas*, or deeds of acknowledgment, signed by the vendees, wherein they admitted that their interest in the turuf was only for the term of the natural life of Mussummaut Rajrajesuree; that they had no power whatever to alienate it by gift, sale, or otherwise; and that, on the demise of the said vendee, the estate would go to

(b) Vide *Dat. Mim. sec. i. par. 15. p. 6.*

(c) Vide *Dat. Mim. sec. iv. par 1. p. 62. and Dat. Chand. sec. ii. par. 29.*

Ram Shunkur Roy's son, Mohun Chund Deb Roy. Agreed with this transfer, Kishempershad Nundee's name was substituted in the Collector's books for that of Ram Shunkur, as proprietor of the turuf. Notwithstanding this agreement, in 1210 B. S. the turuf was sold for 10,000 sicca rupees, to Opindur Narain Chowdree, and his son Gunga Govind Chowdree. The plaintiff was then only ten years old, and the sale therefore remained undisputed till he came of age, when he instituted this suit to set it aside, on the ground of the incompetency of the vendors to alienate it, under their written agreements. Soon after Mohun Chund Deb Roy had filed this plaint, and before the defendants had put in their reply, he demised, and left as his heirs his father, Ram Shunkur Roy, and widow, Mussummaut Taramunnee Dibia. These refused to prosecute the suit; and on the 8th of Poos 1218 B. S. a *razeenama* was signed, giving up the disputed property to Gunga Govind Chowdree, and Opindur Narain Chowdree. The *rakeel* of the plaintiff expressing some doubt regarding the execution of this deed, when it was presented in Court, the Judge referred it to the Court of Jessore, within which jurisdiction Ram Shunkur Roy was residing, for authentication. On being summoned, the zumeendar appeared, and acknowledged having signed the document himself, and also, under authority from Taramunnee Dibia, affixed her seal thereto; at the same time stating that the sale of the *talook* had been effected with his consent, in order to save the remainder of his estate from being sold by the Collector, for arrears of revenue. This appeared perfectly satisfactory to the Judge of the Provincial Court, and he accordingly confirmed the *razeenama*, in a decree, dated 31st of August 1812.

Subsequently to this, it appeared that Mussummaut Taramunnee Dibia was with child by her late husband, and five months after gave birth to the appellant, Shushee Bhoosun Roy. The estate of the minor came under the Court of Wards, who appointed Kishempershad Nundee guardian. Bhowanee Shunkur, who had been Mohun Chund's attorney in the suit, petitioned the Collector for permission to appeal against the decree of the Provincial Court, asserting that the compromise was the effect of collusion between Ram Shunkur Roy and the defendants, and had been countenanced by the guardian, who was a party to the suit, and that the *razeenama* was of no avail, as, at the time of its execution, Taramunnee Dibia was some months advanced in her pregnancy, and was subsequently delivered of a son, who was the real heir of the deceased, and the only person competent to execute a *razeenama*, through his legal guardians. The Collector, (J. I. Middleale,) after going through the proceedings of the case, put a question to the Pundit of the sillah, regarding the right of Mohun Chund to the property, and the validity of the compromise. The Pundit declared the *ikrarnama* executed by Rajrajesureo invalid, and also the *razeenama* to have been signed by incompetent persons. On this the Collector reported the case to the Court of Wards, forwarding Bhowanee Shunkur's petition, and expressing his own opinion, that the claim appeared very doubtful, and the prosecution of it would most probably be prejudicial to the interests of the minor. On the 12th of August 1813, the Court of Wards expressed their concurrence in

1829.

Kumla
Kaunt Chunderbutty,
v. Gooroo
Govind
Chowdree,
Kishenper-
singh Nua-
der, and
Mussum-
maut Raj-
rajesuree
Dibia.

opinion; and prohibited the institution of the appeal. After some changes, Kumla Kaunt Chunderbutty was appointed guardian, and he renewed the subject, and urged the Court of Wards to grant him permission to appeal. They at length consented, on condition that the appeal should be prosecuted at his own risk. He accordingly petitioned the Sudder Dewanny Adawlut to admit an appeal, on the grounds of the incompetency of the parties to compromise the suit; and on the 25th of June and 22d of August 1822, the Second and acting Judges (C. Smith and W. Dorin) passed an order on the petition, admitting the appeal, and directing the prosecution of the suit. A reply was then filed by Gunga Govind Chowdree, on his own part, and for his father, Opindur Narain Chowdree; in which he disclaimed all intention of defrauding any person. He asserted that he had regularly purchased the *talook* from Mussummaut Rajrajesuree, with Ram Shunkur Roy's consent, without a question being raised as to the validity of the title; that it was sold by them; in order to pay the arrears of revenue due on the remainder of the estate; and that his right never would have been disputed, had not some of his discontented dependants urged Mohun Chund to institute the suit for his vexation and annoyance.

On the 4th of August 1825, the case came before Mr. C. Smith, the Second Judge. Observing that the previous orders of this Court set aside the *razeenama*, on which the decree of the Moorshedabad Provincial Court rested, he ordered the proceedings to be returned to that Court, with directions to go into the merits of the case, and report their proceedings to the Sudder Dewanny Adawlut.

Before the case was resumed, Opindur Narain Chowdree demised, as also his son Gunga Govind: both were represented by Gooroo Govind, the eldest son of the latter.

On the 31st of December 1827, the Moorshedabad Provincial Court transmitted their proceedings in the case; and on the 13th of May 1828, Mr. R. H. Rattray gave judgment to the following effect: "It appears from all the documents in the case, that turuf Shujah Nuggur was the ancestral, and not the acquired, property of Ram Shunkur Roy; and that Mohun Chund Deb Roy, his son, was living at the time of the sale, and then six years old. Setting aside all other considerations, it is open to doubt, whether the estate could be sold to the prejudice of Mohun Chund, who had co-parcenary right therein. Legal authorities differ on this point; but it cannot be disputed, that the sale by Ram Shunkur, and acknowledgment by Rajrajesuree, (which was in fact a deed, intended to prevent any alienation of the ancestral property, with expressed reference to the succession of Mohun Chund,) created a right in the turuf on the part of Mohun Chund, even if such right be held to be not legally vested in him from the period of his birth. (a). The respondent's plea, of sale to prevent attachment of the estate by the Collector, has not been satisfactorily established, and would be of no avail, even if it were proved; because there were no arrears due on the property at the time of the transfer from

(a). See notes appended to the case of Chowdhurycburn v. the heirs of Ram Kaunt, vol. 2, p. 202, of Macnaghten's Reports of cases determined in the Court of Sudder Dewanny Adawlut. Also, as involving counter opinions, the cases in vol. 1, p. 41, and vol. 2, p. 42.

CASES IN THE SUDDER DEWAN AND DAWLAH.

Ram Shunkur to Rajrajesuree. The other parts of the estate of the deceased were liable for arrears, which had accumulated on them, and not *this* portion, which was separate from the rest, and on account of which no revenue was due to Government. It was unnecessary to call for a *vyuvustha* in the case; that formerly given by the Pundit of the Jessoro Zillah Court is quite satisfactory, as to the invalidity of the *razeenana*, (executed by Ram Shunkur and Kishenpershad Nundee; and Taramunnee;) and the Court have ruled accordingly; but the declaration regarding the invalidity of the *ikrarnama* executed by Rajrajesuree cannot be upheld, because, if the previous purchase were valid, she was not competent to dispose of the property, as purchased, at her pleasure, but was bound to conform to the contingent stipulation, which declared it to belong to Mohun Chund at her death, and not to be alienable by her to his detriment. I therefore think there is no doubt of the right of the appellant (Mohun Chund's son) to the property, and would reverse the decree of the Provincial Court, and award possession to him on repayment of the purchase money, 10,000 sicca rupees, with interest, to Gooroo Govind: but, as the interest at the usual rate would now exceed the principal, and this is not admissible, I would fix the sum to be paid by the appellants at 20,000 rupees; and if this sum be not paid within six months from the date of the decree in the case, interest to accumulate on it, as principal money, for another period of six months; and if the whole be not then paid, the sale to become absolute, and the turuf to remain in the possession of Gooroo Govind; the respondents to bear the costs.

The case next came before Mr. A. Ross; who, on the 13th of September 1828, deemed it necessary to make a reference to the Pundits of the Court. The question proposed to them by him shews the view he took of the case.

Question. "It appears, from the documents in the case, that Ram Shunkur Roy, an inhabitant of Bengal, made over to his mother, Rajrajesuree, one of the mouzas of which his estate was composed, in lieu of a fixed sum of money, which he used previously to give her for maintenance. The transfer was made in this manner, and on these conditions, viz. that he should execute a deed of sale of the property, in the name of Kishenpershad Nundee, her agent, and that she, on her part, should execute an *ikrarnama*, binding herself not to alienate the property to another person, by sale or gift, but to enjoy the proceeds of the estate during the period of her natural life, and leave it, after her death, to Ram Shunkur's son, and that Kishenpershad Nundee should execute another *ikrarnama* to the same effect. Subsequently to this, all the mehalas which stood in the Collector's books in the names of Ram Shunkur, and his son Mohun Chund, were advertised for public sale, on account of arrears of revenue. Rajrajesuree, in accordance with the wish of Ram Shunkur, and with the concurrence of Kishenpershad Nundee, sold to another person this very mouza, which Ram Shunkur Roy had assigned her for her maintenance, in lieu of a pecuniary stipend. The sale was effected by Kishenpershad Nundee, in his own name. You are therefore called on to state, whether, supposing Mohun Chund to have been of age, and not consenting to the sale, or to have been a minor and consenting,

1829.

thereto, this second sale, effected by Kishenpershad Nundee at the instance of Ram Shunkur and Rajrajesuree, is valid, according to the *shasters* current in Bengal.

Kunla
Kaunt Chu-
kerbutty,
v. Goro
Govind.
Chowdree,
Kishenper-
shad Nun-
dee, and
Mussum-
naut Raj-
rajesuree
Dibia.

Answer. In the case stated by the Collector, the first sale effected by Ram Shunkur was fictitious; being only a transfer of one mouza out of his whole estate to Mussumnaut Rajrajesuree, in order that she might enjoy the profits of it during her life, according to the provisions contained in the two *ikrarnamas*, executed by herself, and Kishenpershad Nundee. The effect of this transaction was only to give Rajrajesuree an interest in the profits of the mouza during her life, and by no means to terminate the right of Ram Shunkur in the soil, because the transaction could not be considered as an absolute sale or gift, such as would terminate the right of the former possessor. Now the law, as current in Bengal, recognizes no proprietary right in the son, so long as that of the father is existent; and therefore, in the case stated, as Ram Shunkur's right in the soil was existent, Mohun Chund could have no claim on it. Nor can the *ikrarna*, executed by Rajrajesuree, be considered as terminating the right of Ram Shunkur Roy in the soil or its profits, after her demise, or as then originating such right in his son Mohun Chund; because the right vested in Rajrajesuree only extended to the enjoyment of the profits of the soil, and that during her life, and never to possession of the soil, or to disposal of the profits thereof after her death; and because an *ikrarna*, such as that executed by Rajrajesuree, is not one of the modes of alienation of property recognized in the *shasters*, and therefore creates no title. As long, therefore, as Ram Shunkur and Rajrajesuree are alive, the consent of Mohun Chund is perfectly unnecessary to the validity of the second sale of the property, since he has no interest in the soil itself, or its profits; and therefore it is superfluous to enter into the consideration of whether he was of age, or a minor, consenting, or not consenting, at the time of the second sale. Seeing, then, that this second sale was executed by Rajrajesuree, the owner of the profits of the soil, at the instance of Ram Shunkur Roy, proprietor of the soil, and through the instrumentality of Kishenpershad Nundee, the ostensible agent; and seeing also that the second sale took place at the time that the whole zumeendaree, entered in the Collector's Registers as the property of Ram Shunkur and Mohun Chund, was advertized for public sale, no doubt whatever can exist as to the second sale effected in Kishenpershad's name, at the instance of Rajrajesuree and Ram Shunkur, being valid and binding according to the *shasters*; because it is laid down, that a sale effected by a person who is not the owner, with the concurrence of the owner, is valid. This *vyavastha* is according to *Menu*, the *Manvartha Muktarati*, *Cul-^a-luca Bhatta*'s comment thereon, the *Daya Bhaga*, *Daya Tutva*, and *Vivada Bhungarhava*.

Authorities.

Menu. "Whenever the Judge discovers a collusive pledge or sale, a collusive gift and acceptance, or, in whatever other case he detects fiction, let him annul the whole transaction." (b) Which passage is

(b) Vide *Menu*, viii. 165. The translation here given differs from Sir W.

thus explained by *Culluca Bhatta*: "Yog means collusion; whatever pledge, sale, gift or acceptance, are effected collusively, and not bond fide, or, in other contracts, when the Judge may detect a fiction in deposits, &c. and that these deposits, &c. have not actually been made, all such transactions let him annul." 1829.
Kisala
Kaunt Chu-
kerbutty,
Gooroo
Govind
Chowdree,
Kishenper-
shad Nun-
dee, and
Mussum-
taut Raj-
rajesuree
Dibia.

The text of *Devala*, quoted in the *Daya Bhaga*, *Daya Tulta*, and *Vivada Bhungarnava*. "When the father is deceased, let the sons divide the father's wealth; for sons have not ownership whilst the father is alive, and free from defect." (c)

Menu. "There are seven virtuous modes of acquiring wealth; succession, occupancy or donation, and purchase or exchange, conquest, lending at interest, husbandry or commerce, and acceptance of presents from respectable persons." (d)

The text of *Nareda*, quoted in the *Daya Bhaga* and other works. "Should they give or sell their own shares, they do all that as they please, for they are masters of their own wealth." (e)

Vivada Bhungarnava. "If the owner assent, a sale made by one who is not an owner is valid, and such is the the current practice." (f)

On the 6th of December 1828, Mr. A. Ross, on a consideration of the circumstances of the case, and the *vyurustha* of the Pundits, deeming the sale of the turuf in question to Opindur Narain Chowdree and Gunga Govind Chowdree, by Ram Shunkur Roy and Rajrajesuree, valid, notwithstanding it was effected without the consent of Mohun Chund Deb Roy, the son of Ram Shunkur Roy, recorded his opinion for upholding the decree of the Provincial Court, and dismissing the appeal with costs to the appellants.

Mr. W. Leycester concurring in this opinion, a final decree was passed accordingly.

Jones's, in the substitution of *collusion* and *fictions* for *fraud* and *fraudulent*. The words in the original will bear the meaning here given, which agrees more nearly with the case in point.

(c) Colebrooke's *Daya Bhaga*, p. 23.

(d) *Menu*, x. 115.

(e) Colebrooke's *Daya Bhaga*, p. 30.

(f) Vide Colebrooke's *Digest*, vol. 2. p. 55.

1829. RAJAH GEEREE SCHUNDUR RAI, Appellant
 Jan. 29th. *versus*
 RAJAH OOMESH CHUNDUR RAI, Guardian of Koowur
 Nur Chundur Roy and others, Minors, Respondent.

The gift of an annuity, made by a zumeendar during his life time, to a younger son, in heu of his share of the zumeendaree, held to be heredita-ble.

THIS case arose out of the disposition of the zumeendaree of Nuddea, made in 1781, by Kishen Chund Rai, the great-grandfather of the appellant, which disposition had been upheld by the decree of the Sudder Dewanny Adawlut, on the 23d of February 1792, in the case of Eshan Chund Rai, appellant, *versus* Eshor Chund Rai, respondent. (a) As the merits of the present case rest on the phraseology of that deed, it is necessary to particularize its provisions. It is a *dan putur*, or deed of gift, executed by Kishen Chund Rai in favour of his son Sheb Chund Rai, and runs thus: "I, Kishen Chund Rai, am arrived at that period of life, that it is burdensome to me to transact the affairs of my estate, and I wish to turn all my attention to the concerns of another world. Therefore, being still of sound disposing mind, I thus, of my own free will, dispose of my property. The *raj* has never been divided for many generations, and therefore I bestow it entire, with all its honours, on you, Sheb Chund Rai, my eldest son; the whole management to rest with you, free from all interference of your brothers. As my son Sumbhoo Chund Rai has many dependent on him, I therefore assign to him an annuity of 15,000 rupees, payable out of the monthly allowance granted me by the Government. To my other surviving sons, Mohesh Chund Rai, and Eshan Chund Rai, I assign annuities of 10,000 rupees each. To Madhub Chund and Jugyo Chund, the adopted children of my deceased sons Bhyrub Chund and Hur Chund, I give annuities of 2,500 rupees each. These sums, amounting to 40,000 rupees annually, to be paid out of the *moshabirah* allowed me by Government. This is a permanent arrangement; neither you nor they shall ever infringe it. Should any one violate it, such violation shall be held illegal by God and man."

Subsequent to this deed, the zumeendaree had been so much impoverished, that during the lives of the original donees, Sumbhoo Chund, Mohesh Chund, and Eshan Chund, their annuities had been reduced to 4,000 and 6,000 rupees; and by the award of the Sudder Dewanny Adawlut, dated 4th of March 1821, the stipend had been continued to the heirs of Sumbhoo Chund, at a still further reduction to 6,000 rupees. The present suit was brought by the respondents, (plaintiffs in the Provincial Court of Calcutta,) to ascertain whether they, as heirs of Eshan Chund, had any right to the annuity of their father after his decease. On the sale of the remainder of the zumeendaree, a sum had been reserved, and vested in Government securities, to liquidate these annuities, and the principal of that sum was held in deposit, by order of the Sudder Dewanny, till the adjustment of this claim.

In the provincial Court, Mr. A. B. Todd decided in favour of the

(a) Vide printed Reports, vol. 1. p. 2.

plaintiffs, on the ground that the annuity had been granted in compensation for an hereditable right ; that the decision of the Sudder Dewanny on the 4th of March 1821, in favour of the heirs of Sumbhoo Chund, had fixed the hereditable nature of the annuities themselves ; and that the smallness of the present sum admitted of no reduction, consistent with the respectability of the parties.

From this decision an appeal was made by the defendant, on the ground that the terms of the deed were not the same in relation to the other sons of Kishen Chund as they were to Sumbhoo Chund ; the number of persons dependent on the latter being specified as a special cause of the grant to him. The cause came to a hearing before Mr. R. H. Rattray, on the 19th of August 1828, who referred the original deed to the Pundit of the Court, and required him to declare, whether the annuities created by it were legally hereditable or not. In reply, the Pundit stated, that the gifts of the zumeendaree, and of the annuities, were similarly circumstanced ; and that, since the annuity was a compensation for a share of the zumeendaree, both were equally hereditable ; that the deed conveyed annuities to the *adopted* children of Kishen Chund's sons, who were less nearly related to him than his own grandsons ; and this afforded a presumption, that the benefit of the latter had been contemplated, and that the stress laid in the conclusion of the deed, on the permanence of the disposition therein made, was a clear indication of the intent of the disposer. On these grounds he declared, that the annuities were certainly hereditable ; and quoted the following passages as his authorities : "Donation creates proprietary right." *Menu.* "There are seven means of acquiring property ; succession, occupancy or donation, purchase or exchange, conquest, lending at interest, husbandry or commerce, and acceptance of presents from respectable men." *Menu.* "The word 'heritage' (*daya*) is used to signify wealth, in which property, dependent on relation to the former owner, arises on the demise of that owner."

Daya Bhaga.

On the delivery of this *vyuvustha*, the appellant thought it prudent to compromise the suit ; and under the sanction of a decree of the Court, dated 29th of January 1829, yielded up the contested point to the respondents in this case, and to the heirs of Mohesh Chund in another similar case then pending.

1829.

Rajah Gee,
reeschan,
tur Rai,
v. Rajah
Mohesh
Rai and
others.

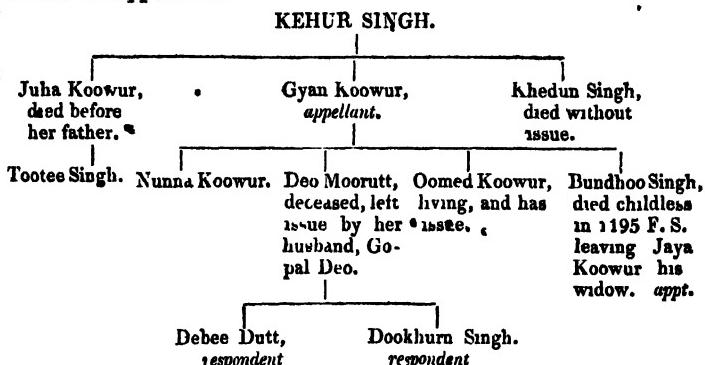
1829.

Feb. 3d.

**MUSSUMMAUT GYAN KOOWUR and JAYA
KOOWUR, Appellants
versus
DOOKHURN SINGH and DEBEE DUTT, Respondents.**

By the Hindoo law, a daughter has no power to alienate by gift her ancestral property, to the detriment of the other heirs of her father.

THIS suit was brought by the respondents, as plaintiffs in the Provincial Court, for possession of two-thirds of sixteen *mehals* in purgunna Tilawuh, zillah Behar, the annual proceeds of the share claimed being 1,799 sicca rupees 9 annas. The following is a sketch of the family of Kehur Singh, the father of Gyan Koowur, one of the appellants.



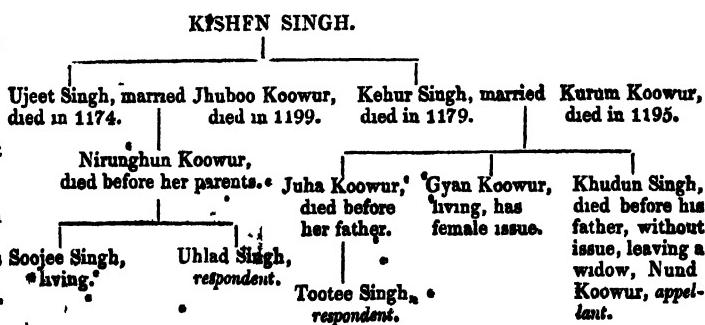
Gyan Koowur had obtained possession of the whole estate of her father, Kehur Singh, under a decree of the Sudder Dewanny, dated 6th of October 1814. (a) The plaintiffs asserted, that, on

(a) This case was not reported in its place. As it in some measure affects this suit, and is in itself remarkable, a brief abstract of it is subjoined:

By the Hindoo law, as current in the west, a widow does not inherit the property of her husband, when held in co-partnery, but only when held in se-
veralty. In the former case, she is only entitled to maintenance out of it.

NUND KOOWUR, Appellant
versus
TOOTEE SINGH and UHLAD SINGH, Respondents.

The relationship of the parties concerned appears from the following sketch :



After the death of Ujeet Singh, Jhuboo Koowur succeeded to his share; and

the 6th of November 1816, she executed a deed of partition of the whole estate amongst her three daughters, Nunna Koowur, Deo

after Kehur Singh's death, Kurum Koowur took possession of his share of the Koowur estate of their father, Kishen Singh. On the demise of the latter, Nund and Jaya Koowur sued for the whole estate, as the widow of the only male descendant of Koowur, v. Kishen Singh. Uhlad Singh and Itoote Singh claimed the respective shares Dookhara of their maternal grandfather, Ujeet Singh, and Kehur Singh, as their heirs at law. On the 13th of March 1813, Mr. H. Colebrooke put the following questions to the Pundits of the Sudder Dewanny Adawlut.

Question 1. "If Kehur Singh and Ujeet Singh had held, in coparcenary, the estate which they inherited from their father, Kishen Singh, to whom would it go after the death of their widows, whether to the wife of a son who died before them, to a surviving daughter, to the sons of their deceased daughters, or to their shugra?"

Question 2. "If they had held the estate in severality, and not in coparcenary, who would inherit?"

Answer to question 1. "If the estate had been held by the brothers jointly, then, on the death of Ujeet Singh, his interest would have devolved on his brother, Kehur Singh, and not on his widow, Jhuboo Koowur. On this supposition, then, Kishen Singh's estate would have come entire to Kehur Singh, and after his death, and the demise of his widow, Gyan Koowur, his daughter would be entitled to the whole, to the exclusion of all other claimants. Nund Koowur, the son's childless widow, is only entitled to maintenance out of the estate.

Authorities.

The text of *Nareda*, quoted in the *Mitachara Viramitrodaya*, *Vyavahara Madhava*, *Vyavahara Mayukh*, *Vivada Tantava*, and others. "Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth, except the wife's separate property." (a)

Mitachara. "If the husband die, either unseparated from his coparceners, or reunited with them, his widow has no right to the succession." (b)

The text of *Nareda*, and others, quoted in the *Viramitrodaya*. "If sons have lived unseparated, or have reunited, the childless widow of one of them, though chaste, is entitled only to her maintenance."

The text of *Vrihaspati*, quoted in the *Mitacharya*, *Viramitrodaya*, *Vivada Tantava*, and other treatises. "As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take the father's wealth?" (c)

Answer to question 2. If Ujeet Singh and Kehur Singh held the estate in severality, the share of the former will go, on his death, to his widow, Jhuboo Koowur, and after her death to Sooghee Singh and Uhlad Singh equally. On the demise of Kehur Singh, and of his widow, their daughter, Gyan Koowur, will inherit the whole of his share, and Nund Koowur only be entitled to maintenance out of that share.

Authority.

The text of *Yaynyavaleya*, quoted in the *Mitachara*, &c. "The wife, and the daughters also, &c. are heirs in succession to the estate of one who departed for heaven, leaving no male issue" (d)

Mitachara, and other treatises. "When a man, who was separated from his co-heirs and not reunited with them, dies leaving no male issue, his widow, if chaste, takes the estate in the first instance." (e)

The Court (present H Colebrooke and J. Fombelle) were of opinion, that the uncontested possession which Jhuboo Koowur had held of the estate of her deceased husband for many years, was proof of the property having been separated, and therefore passed a decree, agreeably with the *vivyavatha*, awarding Ujeet Singh's share to his heirs, Sooghee Singh and Uhlad Singh, and Kehur Singh's portion to his daughter, Gyan Koowur.

(a) Vide Colebrooke's *Mitachara*, c. ii sec. 1. para. 7. p. 326.

(b) Ibid. c. ii sec. 1. para. 19. p. 331.

(c) Ibid c. ii sec. 2. para. 2. p. 341.

(d) Ibid c. ii sec. 1. para. 2. p. 324.

(e) Ibid c. ii sec. 1. para. 30. p. 335.

1829. Moorutt, and Oomed Koowur, or their then existing heirs; and under the deed they jointly claimed one share in right of their mother, ~~Geo~~ Moorutt; and Dookhurn Singh a second share, as the adopted son of Nunna Koowur. Gyan Koowur, on the other hand, denied that she had ever executed such a deed, but on the contrary pleaded, that she had previously, in October 1815, bestowed the whole estate as a gift on Jaya Koowur, the widow of her deceased son. The legality of this deed of gift was denied by the defendants. The Judge of the Provincial Court, Mr. J. H. Elliott, referred the point of law to the Pundits of the Provincial and City Courts of Patna. They declared that Gyan Koowur was incompetent to alienate, by gift, the ancestral property she held, whilst there were heirs and claimants to the estate living. On this opinion Mr. Elliott passed a decree, setting aside the gift of Gyan Koowur to Jaya Koowur; but as he gave no credit to the deed of partition, on which the plaintiff's claim was founded, he also dismissed their suit, leaving the estate in Gyan Koowur's possession. Costs payable by the defendants.

From this decision Gyan Koowur and Jaya Koowur preferred an appeal to the Sudder Dewanny Adawlut. They pleaded, as the grounds of their appeal, that it had been ruled in the very decree by which Gyan Koowur gained possession of the estate; that the daughter's son had no right of inheritance, during the life of the daughter; that therefore Oomed Koowur was her legal heir; and that, as her only heir made no objection to the gift, it was unjust to set aside that gift on the shewing of the respondents, who were not heirs. On the 9th of April 1828, the case came before the Third Judge (C. T. Sealy). He referred the proceedings to the Hindoo law officers of the Court, and called on them to declare, according to the *Maithila* and western schools of law, whether Gyan Koowur was competent to bestow the estate in gift on Jaya Koowur; and if not, who was entitled to the estate on her decease. Their reply was to the following effect: "When a person dies, leaving no male issue, the widow who succeeds to his estate has no right to alienate any part of it, except for religious purposes; and therefore the daughter, whose right of inheritance is weaker, that is, who only succeeds on failure of the widow, *a fortiori*, can have no such right. Now it appears, from the decree of the Sudder Dewanny Adawlut, dated 6th of October 1814, that the property in question is ancestral, and not Gyan Koowur's peculiar property, (*stridhun*), and also it seems from the deed of gift, that such gift was not made for religious purposes. According, therefore, to the law, as current both in *Maithila* and the west, the deed is invalid; such being the case, the property will go, after her death, to the nearest heir of her father, Kehur Singh, then living. For, as in the case of the widow, the property goes, on her decease, not to her heir, but to the nearest heir of her husband, who may be then living; so the same rule is to be observed *a fortiori* as regards the daughter. Now according to the *Maithila* school, there is no descendant of Kehur Singh, who can inherit from him, and therefore, on Gyan Koowur's death, the estate will go to the descendant of his father, or grandfather, or other ancestor who may be his nearest *sapinda*. According

CASES IN THE SUDDER DEWANNY ADAWLT.

however, to the western school, Tootee Singh, the son of Kehur Singh's daughter, will succeed to the whole estate on his death of Gyan Koowur, should he survive her. This difference arises from the western school considering the daughter's son to be an heir, who is not acknowledged as such in *Maithila*. This *vivruha* is agreeable to the *Vivada Chintamani*, *Vivada Retnacara*, and *Vivada Chandra*, and other authorities recognized in *Maithila*, and to the *Mitacshara*, *Viramitrodaya*, *Vyavahara Madhava*, *Vyavahara Mayukh*, and other authorities recognized in the west." Munshi maut Gyan Koowur, and Jaya Koowur, v. Dookhurn Singh and Debes Dutt.

Mahabharat. "For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth." The *Vivada Chintamani* explains "waste", to mean gift or sale, &c. at pleasure. *Viramitrodaya*. "The power of a daughter over ancestral property is not such as that she should alienate it at pleasure."

The text of *Catyayana*, quoted in the *Retnacara*, *Viramitrodaya*, and other treatises. "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Vivada Chintamani. "First his own son, then his son's son, then his son's grandson, then his chaste wife, daughter, mother, father, brother, brother's son, and nearest *sapinda*, each claims the inheritance on failure of the preceding."

Mitacshara. "On failure of the daughter, her son claims a share."

Viramitrodaya. "On failure of the daughter, her son (inherits.)"

It thus appearing that the gift of Gyan Koowur to Jaya Koowur was invalid, Mr. Sealy, on the 5th of May 1828, affirmed the decree of the lower Court, as far as regarded the litigated property; but as he made their own costs, in both Courts, payable by each party, the opinion of another Judge on this point was necessary, and the case was accordingly brought before the Fifth Judge (R. H. Rattray). In the meantime, Gyan Koowur died; and on the 27th of May, proclamation being made for her heirs, only her daughter, Oomed Koowur, appeared to claim the property. On the 3d of February 1829, the case came on finally before Mr. Rattray. He coincided in opinion with Mr. Sealy, and accordingly made their own costs, in both Courts, payable by the parties respectively, Oomed Koowur to discharge the costs due by Gyan Koowur. Possession of the estate was not awarded to any one by the Court; but any person who considered he had a title to it, was left at liberty to prefer his claim in the Civil Court, according to the regulations.

MIRZA BEEBEE, Appellant

versus

TOOLA BEEBEE, and, on her death, MIRZA NUBBEE
BUKSH in his own behalf, and as, Guardian of Mihr Ali,
a Minor, Respondent.

Feb. 5th.

A woman, in exchange for a *chumpakullee*, or necklace, gave half of her property to another person, on condition that the latter should not renounce it but leave it, on her death, to two individuals named in the deed of conveyance.

Held, that the transaction, being a gift for a consideration, was, according to Mahomedan law, in reality a

sale, that the conditions of the deed were not binding, and that, on the death of the vendee, the property would

descend to her heirs, to the exclusion of the persons in whose favour those conditions were made,

THIS was a suit instituted in the Dacca Provincial Court by the appellant, on the 13th of September 1823, to recover possession of an eight ana share in certain talooks, and other property, valued at 5,425 rupees, 2 anas, 3 gundas.

This case depended on a document, purporting to be a *hibbehnama*, or deed of gift, the authenticity of which was admitted by both parties. By this deed, which was dated 23d of Bhadoon 1218 B. S. Hamidoonisa, in consideration of a *chumpakullee* necklace which she received from Salihah Khanum, assigned and made over to the latter an eight ana share of all her landed and other property, subject to the following conditions; viz. that she should manage and enjoy possession of the property during her life time, (but without the power to alienate it by sale or gift,) and should support and educate Mirza Nubbee Buksh and Shurufoonisa, the children of Imam Buksh, between whom it was to be divided on her death. Imam Buksh, it seemed, was the adopted son of Hamidoonisa; Salihah Khanum was his wife, but had no issue; and Nubbee Buksh and Shurufoonisa were his children by a concubine, the defendant, Toola Beebee. Salihah Khanum died in 1223 B. S. and the plaintiff her sister now claimed the property as her heir. She contended, that the deed executed by Hamidoonisa was valid, so far as it regarded the transfer of her property, which accordingly became the property of Salihah Khanum, on whose death it would descend to her heirs; but that, as the transaction was in fact a sale, the conditions of the deed were not binding. This, however, did not affect the validity of the sale.

On the other hand it was maintained, that the gift of the property was in reality intended for Nubbee Buksh and Shurufoonisa; but that, as they were minors, the name of Salihah Khanum was introduced into the deed, and she was appointed to manage the property on their behalf: that Salihah Khanum having consented to the terms of the gift, it was the intention, both of the donor and the donee, that the property should descend to Nubbee Buksh and Shurufoonisa, who were accordingly entitled to it, under the conditions of the deed, on the death of Salihah Khanum.

As the suit involved a point of Mahomedan law, the Fourth Judge of the Dacca Provincial Court (C. W. Steer) referred the case for the *futva* of his law officer, who declared, that the *hibbeh-nama*, or deed of conveyance, by which Hamidoonisa assigned half her property to Salihah Khanum, was valid and held good, as far as it regarded the transfer of the property; but that, as a *hibbeh-bil-envuz*, or gift for consideration, amounted in law to a 'sale,' the conditions of the *hibbeh-nama* were null and

CASES IN THE SUDDER DEWANNY ADAWLUT.

void, and the property, conveyed by it would, on the death of Salihah Khanum, descend to her heirs, to the entire exclusion of Nubbee Buksh and Shurufoonisa.

Mr. Steer overruled this *futwa*; and, considering that Nubbee Buksh and Shurufoonisa were entitled, on the death of Salihah Khanum, to the property in dispute, under the conditions of the deed executed, by Hamidoonisa, which barred the plaintiff's claim as heir, dismissed the suit with costs.

Mirza Beebee appealed to the Sudder Dewanny Adawlut. Toola Beebee demised, and Nubbee Buksh succeeded her as respondent, on his own behalf, and as guardian of Mirz Ali, the minor son of the late Shurufoonisa.

The case was heard before the Third Judge, (C. T. Sealy,) on the 25th and 26th of November 1828, by whom it was referred to the Mahomedan law officers of the Court, for their *futwa*, and they were called upon to state,

1st. Whether the deed executed by Hamidoonisa, in favour of Salihah Khanum, was in law a *hubbehnama*, or deed of gift?

2d. If the transaction was considered not a gift, but a sale of the property, to Salihah Khanum, in consequence of Hamidoonisa having received the *chumpakullee* as a consideration, whether the deed was null and void, inasmuch as a gift was evidently intended by Hamidoonisa; and, in such a case, whether the *chumpakullee* would be restored to the heirs of Salihah Khanum, and the property returned and belong to the heirs of Hamidoonisa.

3d. If it was considered a sale, whether the purchaser, Salihah Khanum, who had assented to the terms of the transfer, was or was not bound to fulfil the conditions of the deed; or whether the conditions were themselves null and void, but without affecting the validity of the sale.

4th. If it was a sale, to whom the property would descend on the death of Salihah Khanum.

Answer 1st. It appears that Hamidoonisa made a gift of half her property to Salihah Khanum, in consideration of a *chumpakullee*: in the eye of the law the gift of one thing in exchange for another is a sale; and accordingly the above transaction was in reality a sale, and is valid, provided the *chumpakullee* was produced and delivered at the time of the transaction.

2d. The sale being valid, the *chumpakullee* will not be restored to the heirs of Salihah Khanum, nor will the property specified in the deed revert to the heirs of Hamidoonisa.

3d. The conditions introduced into the *hubbehnama*, declaratory of the intention of the parties, are null and void, but do not vitiate the sale.

4th. If the sale be valid, the property will descend, on her death, to the heirs of Salihah Khanum.

It was deemed necessary to put a further question to the law officers of the Court; and they were accordingly called upon to state, whether the mention in the *hubbehnama*, of Hamidoonisa having made a *hubbehnama*, or gift of the property therein specified, to Salihah Khanum, in consideration of a *chumpakullee*, was sufficient proof of the delivery of the *chumpakullee*, or whether it was necessary to establish this point by evidence.

1828.

Mirza

Beebee, v.

Toola Bee-

bee and

Mirza Nub-

bee Buksh.

1829. In reply, the law officers declared, that the mention of the circumstance in the *hibbehnama* was only sufficient to prove Mirza Hamsidoonisa's share in the transaction; viz. that she gave her Tools Beebee and property for the *chumpakullee*, but did not prove the receipt or Mirza Nubbee Buksh further evidence.

The appellant filed a petition, stating that the delivery of the *chumpakullee* was clearly proved by the evidence adduced in a criminal case, committed for trial to the Dacca Court of Circuit, and referred by them to the Nizamut Adawlut, by whom it was decided.

The record of the above trial having been filed and read, Mr. Sealy recorded his opinion to the following effect, on the 27th of January 1829.

After a due consideration of all the papers and circumstances of this case, but particularly with reference to the evidence adduced before the Court of Circuit for the division of Dacca, in a criminal trial held at the first sessions of 1811, I am of opinion, that the receipt of a *chumpakullee*, from Salihah Khanum, by Hamidoonisa, in consideration of which the latter gave her the property specified in the *hibbehnama*, is clearly proved. The *futwa* declares, that as Hamidoonisa received a *chumpakullee* in exchange for her property, the transaction was in reality a sale to Salihah Khanum, on whose death the property will go to her heirs, viz. the appellant, to the entire exclusion of Nubbee Buksh and Shurufoonisa. I am therefore of opinion, that the judgment of the Provincial Court should be reversed, and the claim decreed.

The case was next brought before Mr. Turnbull, who pronounced judgment on the 5th of February 1829. After recapitulating the circumstances of the transaction, in which the present suit originated, he observed, that by section 15, regulation 4, 1793, the Court was directed in suits involving points of law, in which the parties were Mahomedans, to call on their Mahomedan law officers for an exposition of the law, and regulate their decision accordingly. The *futwa* delivered in the present case declared, that the gift, by Hamidoonisa, of the property in dispute to Salihah Khanum, in consideration of a *chumpakullee*, amounted to a sale; that such sale was good and valid, and could not be vitiated by the conditions specified in the deed of conveyance. Under these circumstances he concurred with Mr. Sealy in upholding the appellant's claim, as heir at law to her sister, Salihah Khanum.

A decree was accordingly passed, reversing the judgment of the Provincial Court, and making all costs payable by the respondent.

CASES IN THE SUDDER DEWANNY ADAWLUTA.

MUSSUMMAUT JOYMUNNEE DIBIA and RAM BHUDUR CHUKURBUTTY, Appellants

versus
FAKEER CHUNDUR CHUKURBUTTY, Respondent.

THIS suit was instituted by the respondent in the Court of the Suburbs of Calcutta, to establish his right of officiating, for four days and a half in each month, in the temple of Punchanun Thakoor at Kidderpore, in purguntas Mughoorah, laying his suit at 450 rupees, the price of the temple, and 300 rupees, its profits from Poos 1224 to Aghun 1225, in all 750 rupees.

The plaint set forth the following circumstances: Ram Lo-chun Chukurbutty died seized of nine biswas of *devuttur* land, a house, share in a tank, right of officiating for nine days and a half in the month, in the temple of Punchanun Thakoor, and one out of two biswas of land, on which the said temple was erected, and left a widow, Mussummaut Koontee, and a son, Gour Hurree. Gour Hurree died childless, shortly after inheriting the property, and left his mother, and widow, Mussummaut Joymunnee. A quarrel arose between the two, respecting the right to the property, which was at length settled, on the 2d of Phagoon 1223 B. S. by a compromise in the form of a *farighkhuttee*, or deed of release; by which the property was divided equally between the mother and widow, each reserving power to alienate her share, by gift or sale. Under this settlement, Koontee mortgaged her property to Ram Mohun Pal, for 401 rupees, and afterwards, on the 5th of Asam 1224, sold it to the plaintiff for 526 rupees, redeeming the mortgage by repayment of the loan with interest, and expending the remainder in religious offices. She died in Poos of the same year, and the defendants then ousted the plaintiff of his right in the temple, though he had held possession of it in the interval between the sale and death of the vender.

The defendants in reply denied all knowledge of the compromise, or subsequent mortgage or sale. Joymunnee pleaded, that she had inherited the property as her husband's heir; that Koontee had no claim on it, except that of maintenance; and that, even if she herself had executed the alleged compromise, it would be invalid, as she had no power of alienation, far less of empowering others to alienate.

The Zillah Judge considered the *farighkhuttee*, mortgage and sale, to be satisfactorily proved on the part of the plaintiff, and that these perfectly established his right; and therefore passed a decree in his favour.

The defendants appealed to the Calcutta Provincial Court; and, on the 18th of March 1823, the case came on before the acting Judge (R. Walpole). He made a reference to the Pundit, as to the validity of the *farighkhuttee*, and the sale effected on the strength of it. The Pundit replied, that the *farighkhuttee* was void, because Joymunnee had only a life interest in land inherited from her husband, and because *devuttur* land was not a fit subject for sale. The respondents, on the 21st of May 1823,

1829. filed a *vyavastha*, which had been given in the S_y
 wanny Adawlut on the 21st of January 1817, in a m_{il}
 Mussum- proceeding, on the petition of Anund Mohun Gorain against
 maut Joy- Anund Chundur Gomain, from which it appeared, that a right
 munnee Di- to officiate for a certain number of days in a temple is saleable.
 bia and Mr. Walpole decreed, that the objection stated by the Provincial
 Ram Bhu- Court Pundit to the validity of the *farighkhuffee* rested on
 dur Chuk- grounds, which might be of avail on the suit of any other heirs
 urbutty, v. of Gour Hurree, but that the agreement voluntarily made by
 Fakir Chundur Joymumee must be held good against herself; and that it appeared,
 Chukur- from the Sudder *vyavastha*, that the litigated property was
 butty. saleable. He therefore affirmed the decree of the lower Court,
 making a special reservation in favour of any heirs of Gour Hurree,
 who might subsequently wish to assert their claims.

The appellants, dissatisfied with this decision, preferred a special appeal to the Sudder Dewanny Adawlut, which was admitted, on the ground of suspicion attaching to the documents produced by the appellants, and on the apparent discrepancy between the *vyavastha* of the Pundit and decree of the Provincial Court.

On the 25th of September 1818, Mr. W. Leycester proposed three questions to the Pundits of the Court.

Question 1. A person died, seized of *devastur* land and a certain right of officiating in the worship of an idol, and left a wife, son, and son's wife; the son afterwards died childless, leaving his mother and widow. Which of these is entitled to his property?

Answer. The widow solely is entitled to it; because, on the death of the father, the property vested in the son, and, on his death, goes to his nearest heir, who, in the case proposed, is his widow.

Question 2. If the mother and widow, in composition of their real or supposed claims, agreed to divide the property, with a stipulation that each should be competent to alienate her own share, is such agreement valid, as regards the land and temple?

Answer. The agreement cannot be held valid in law, as regards the *devastur* land and temple, because, as before stated, the property belongs to the widow, but without any power on her part to alienate it; and besides, none but the *debtia* has any right in *devastur* lands.

Authorities.

Menu. "Any evil-hearted wretch, who, through covetousness, shall seize the property of the gods or the brammins, shall feed, in another world, on theorts of vultures." (a)

Culluca Bhattacharya Comment on this text. "Wealth given for the sake of the *debtia* is called their property."

The text of *Catyayana*, quoted in the *Daya Bhaga*. "Let the childless widow, preserving unguiled the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." (b)

(a) Vide *Menu*, Ed. 36.

(b) Vide Colebrooke's translation of the *Daya Bhaga*, p. 189.

Question 3. If the mother and widow, according to this agreement, become seized of their respective shares, and the mother, during the widow's life, sell her share, either to pay off a mortgage on it, or for her religious welfare, or to discharge her husband's debts, is the sale valid?

^{Musummaut Joy-}
Answer. The sale is invalid; because, as stated in the answer to question 1, the mother has no interest in the property of her own right, nor can she derive any from the agreement with the widow, as stated in the answer to question 2.

The text of *Calyayana*, quoted in the *Vivada Bhungarnava*: "Let the Judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." (c)

^{Ham Abu-}
^{dur Chuk-}
^{urbatty, a.}
^{Fakeer}
^{Chundur}
^{Chukur-}
^{butty.}
Menu. "A gift or sale, made by any other than the true owner, must, by a settled rule, be considered in judicial proceedings, as not made." (d)

On receipt of this *tyavastha*, Mr. Leycester declared his opinion, that the *farighkhuttee* could not be upheld, as it was not within the competency of Joymunnee to execute such a deed, and because its execution was founded on the assumption of a right in her, which was not really existent; that, as the *farighkhuttee* was null and void, the sale which was effected on the strength of it must be set aside; and that therefore the decrees of the lower Courts should be reversed, and the appellants left in possession of the whole right of officiating in the temple.

Mr. M. H. Turnbull concurred in this view of the case; and on these grounds, as well as in consequence of some doubts he entertained regarding the authenticity of the documents filed by the plaintiffs, agreed in reversing the decree of the lower Court, and made the costs, in all three, payable by the respondent.

KALLUPNATH SINGH, Appellant
versus
KUMLAPUT JAH and others, Respondents.

1829.

May 19th.

THIS was a suit instituted in the Purneah Zillah Court, on the 31st of January 1820, by the appellant, against Kumlaput Jah, the surety, and Mussummaut Gosai, Owain, the mother and guardian of the late Domun Jah, to recover 1,559 rupees, principal and interest of balance of rent for talooks Gundurah and Nynsoon, for the year 1223 *Moolkee*.

The plaint set forth, that Bhungee Jah took four mquzas, viz. Gundurah, Nynsoonder, Chowndee, and Govindpoor, on a lease of engagement, from 1220 to 1224 *Moolkees*, inclusive, in the name of his son, Domun Jah, a minor, for whom he became surety. In 1223 *Moolkee*, Bhungee Jah having died, Domun Jah refused to

(c) Vide Colebrooke's Digest of Hindu Law, vol. 2. p. 76.

(d) *Menu*, viii. 499.

1879.

retain more than the two first-named mouzas; and the lease, as it regarded them, was confirmed on the security of Kumlaput Jah. The rent for 1223 *Moolkee* not having been discharged, the plaintiff's father had originally instituted a summary suit against Domun Jah and his surety, but was remitted, on the ground that Domun Jah was a minor; and he therefore brought his present action against his surety, and Gosain Owjain, who was his mother and guardian.

In defence it was pleaded, that Domun Jah was a minor, of which fact the plaintiff was aware; and that his mother's consent and authority never having been obtained, any engagements entered into by him were null and void. With regard to the transaction out of which the present action arose, it was stated, that Bhungee Jah took the four mouzas above noticed, on a five years' lease, from 1220 to 1224 *Moolkee*, inclusive, in the name of Domun Jah, but that Kumlaput was the security; that all four mouzas were included in one *pollah*; that the rent had been regularly paid by Bhungee Jah till his death, in Kathik 1222; and that the balance for that year had also been realized by the plaintiff's father. In 1223, he had granted a new lease of Chowndee and Govindpoor, which were productive and profitable mouzas, to a person of the name of Deyanut Oolah, leaving the other two mouzas, which were a source of great loss and expence, on the hands of Domun Jah; and that, moreover, he had unjustly sold part of the female defendant's property, in satisfaction of the arrears of 1223.

In replication the plaintiff admitted that the rent for 1222 *Moolkee*, of all four mouzas, had been duly discharged by Kumlaput, after Bhungee Jah's death, and stated that Domun Jah had insisted on giving up mouzas Govindpoor and Chowndee, and had executed a *baznama*, or deed of relinquishment, to that effect; that the lease of the other two mouzas was accordingly confirmed, Kumlaput becoming security; that the proceeds of the sale alleged by Mussummaut Gosain Owjain had been justly and equitably deducted; that the former suit was dismissed on the sole ground of Domun Jah being a minor; and that the plaintiff's father had, on that occasion, been referred to a regular suit, as could be proved by the record of the case.

In rejoinder the defendants altogether denied the relinquishment of Chowndee and Govindpoor.

The officiating Zillah Judge observed, that the plaintiff had admitted that Domun Jah was a minor, and his mother and guardian, the defendant Gosain Owjain, had distinctly denied that her consent or authority had been obtained in the transaction, which formed the subject of the present action. Such being the case, the Court could not recognize the act of a minor. Independent of this, the defendants had stated, that the plaintiff's father had formed a new engagement for two of the villages, which were a source of profit, and left the other two, which were attended with loss and expence, on the hands of Domun Jah. In answer to this the plaintiff had pleaded a deed of renunciation on the part of the lessee, but had not been able to produce the document. The *pollah* produced by the female defendant contained no distinct and separate specification of the jumma for each mouza, and under

these circumstances the plaintiff's father had clearly no right to disjoin them, and form a fresh settlement for two only, out of the four. He therefore dismissed the suit with costs.

This Judgment was confirmed on an appeal to the Mymensingh Provincial Court.

A petition for a special appeal was submitted to the Sudder Dewanny Adawlut. The fact of the lease being admitted, and there being no ground for supposing that Kumlaput, the acknowledged surety, was also a minor at the time of the transaction, and no reason having been assigned in the decrees of the lower Courts, why he should be exempted from liability to the claim, Messrs. Smith and Shakespear considered a further investigation desirable, and concurred in the propriety of allowing a special appeal.

On the death of Domun Jah, his mother, Gosain Owjain, and widow, Bhumma Owjain, became his representatives in the suit.

The case was heard before Mr. Sealy, on the 11th and 12th of May 1829, when the appellant's *vakeel* requested that the Hindoo law officer might be called on to state, whether the lease entered into by Domun Jah, on the security of Kumlaput, was valid or not, according to the *shasters*.

The question was accordingly propounded to Byjnath Misir, the Pundit of the Court, who stated in reply, that, according to the *shasters*, a minor had no power to contract for a lease, nor was any deed executed by him valid.

As it appeared that the lease entered into by Domun Jah, while under age, was, according to the Hindoo law, void, *ex initio*, Mr. Sealy recorded his opinion, that the present claim would not lie either against him or his surety. The judgment of the two lower Courts was accordingly confirmed, and the appeal dismissed with costs.

BIRJ MOHUN SEIN and RAJ KISHORE SEIN, Appellants

versus

RAM NURSINGH RAI, Guardian of KISHEN KOOMAR CHOWDHREE, Minor, Son of RAJ CHUNDUR CHOWDHREE, deceased, and BEJEEA CHOWDHREE and others, Respondents.

1829.

May 19th.

THIS suit was brought by the appellants, formerly plaintiffs in the Dacca Provincial Court, for the possession of Hath Kadir Gunje, called also Raj Gunje, mouza Bagber, and other mouzas and kismuts, in all twenty-seven, forming a talook situate in purgunna Sherpoor, and originally the zumeendaree of Raj Chundur Chowdhree. The suit was laid at 5,500 sicca rupees, the annual rent of the talook. They founded their claim on a deed of sale, said to have been executed by Raj Chundur Chowdhree, in favour of Sree Munt Rai, their paternal uncle's son, on the 19th of Jeyte, 1208 B. S. corresponding with the 90th of May 1796. The original purchaser, they

The respondents had collusively created a fictitious talook in favour of the appellants, to evade a decree passed against them in another

1829.

suit, and were now obliged to plead their previous collusion in bar to the suit brought against them for possession of that very talook. alleged, had obtained immediate possession ; had kept it undisturbed till 1218 B. S. when he died, and the talook devolved on his mother, Taramunnee ; that she gave it to Sheeb Chundur Das, her sister's son, who remained in possession till his death, and was succeeded by his father, Juddoo Nundun Das, by whom, in 1223, all claim to the estate was relinquished ; and that it then was re-incorporated into the estate, and divided amongst the defendants, on the general partition of the zume-n-darree. The alienation of the talook, by Taramunnee, to Sheeb Chundur Das, they argued, was totally illegal, as they themselves were then alive, and the rightful claimants of the estate ; and that therefore the acts of the donee, or his heirs, could not be held to bar their own right to the property ; that, in fine, they now sued as heirs of Sree Munt Rai, for the talook which he had purchased, and of which they had been deprived by the acts of incompetent persons.

On a full investigation of the case, it appeared, that it arose out of the proceedings, in execution of a decree passed by the Sudder Dewanny Adawlut, on the 15th of January 1808, in the case of Purtabnarin and Raj Chundur, appellants, *versus* Opindurnarain and Mussummaut Bhuvani Dasea. (a) In that case, the Court had decreed a division of the nine ana share of the Sherpoor zumeendaree, formerly in possession of the appellants, in the proportions of five anas and a half to them, and three and a half to the respondents ; such division to be carried into effect by the Collector of the district in the usual manner. As considerable difficulty was experienced in carrying this partition into effect, Mr. E. Maxwell, then Assistant to the Collector of Mymunsingh, was deputed to make the arrangement. The result of his inquiry, made on the spot, and with every possible care, established the fact that Raj Chundur Chowdhree, in order to evade compliance with the decree, which had been passed against him, created, subsequently to the date of the decree, three fictitious talooks, which he asserted had been separated in perpetuity from the estate several years previous, and which reduced the remainder to a mere shadow, scarcely worth the expence of litigation. The talook which formed the subject of the present suit was one of these three, and then in possession of Sheeb Chundur Das ; and it is remarkable, that in Mr. Maxwell's report to the Collector, he mentions the fact of the illegal but then uncontested donation of Taramunnee, as a presumption against the real existence of the talook. Mr. Maxwell's investigation so fully established the villany of Raj Chundur, in having separated the talooks from the estate subsequently to the date of the decree against him in the Sudder Dewanny Adawlut, and antedated the deeds which caused the dismemberment, that he was glad to be allowed to compromise the affair by a private adjustment with the opposite party. In a *ruffanama*, executed on the 5th of Sawun 1223, corresponding with the 20th of July 1816, he tacitly admitted the fictitious nature of the talooks, by agreeing to a division of the

(a) Vide printed Reports, vol. i. p. 225.

whole nine ana share of the zumeendaree, on the basis of the award of the Sudder Dewanny. In order to assert their own right, the respondents were forced to plead the foregoing circumstances; and thus, by the admission of their villany on the former occasion, avert its effects in the present. The mass of evidence collected by Mr. Maxwell during his investigation, fully bore out their statement; and on these grounds the suit was dismissed in the Dacca Provincial Court. On appeal to the Sudder Dewanny, Mr. R. H. Rattray, taking the same view of the case, the facts of which were not invalidated by any thing advanced in appeal, affirmed the decision of the lower Court, with costs to the appellants.

1899.

Biru Ma-

hun Sen

and Raj

Kishore

Sen, v.

Ram Nur-

singh Rai

and others.

BHOWANEE PURSHAD CHOWDREE and BISHO-NATH CHUNKDAR, Guardians of KONWUR ANUND
R.M., Minor, Appellants

1899.
Nov. 18th.

versus
RANEE JUGUDUMBIJA, Respondent.

THIS suit was originally instituted in the Moorshedabad Provincial Court, by Ranee Dhukna, on account of her adopted son Anund Rai, a minor, for entry of his name as *shevait* of mehal Boodhee and four other mehals, the yearly revenue assessed on which was 6,241 secca rupees.

It appeared, that during the life time of Rajah Ram Kishen Rai, the father of Rajah Shebnath Rai, Ranee Dhukna's deceased husband, certain lands paying revenue were appropriated to the service of some Hindoo idols. These lands, on the 11th of Aghun 1199, were conveyed to Shebnath Rai by his father, in a deed to the following effect: "The worship of Sree Eshur Thakoor-
ranee has been established by me in Nattore, as was also the worship of Sree Eshur Thakoor, by my late grandmother, who made over the endowment to me. These two places of worship, and the *devuttur* land attached to them, as well as the *talookas*, *ijaras*, and assignments in cash on Chuklah Bitoreah and others, all these, of my free will, I make over to you; you must take possession of the *devuttur* land, and of the *talookas* and *ijaras*; and yourself, and children after you, from the proceeds of the land and the assignment in money, must perform the worship of the idols." In accordance with this d^ec^t, Shebnath Rai took possession of mehal Boodhee and others, and four other mehals. These were registered in the Collector's office as the property of Bindrabund Chyndur Thakoor, and other Hindoo idols, the name of Shebnath Rai being entered as *shepait*, or superintendent of the endowment. For many years he collected the revenue on the mehals in question, paid in to Government the sum at which they were assessed, and avowedly expended the

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Bengal.

1829.

Bhowanee Purshad Chowdree and Bishonath Chunkdar,
i.e. Ranee Jugudumbha.

balance on the worship of the idol. In 1218 B. S. Rajah Shebnath Rai executed five deeds in the names of the idols, who were registered in the Collector's books as proprietors of the several mehals, together with his own name as *shevait*, whereby he conveyed these mehals in full proprietary right to one of his wives, Ranee Jugudumbha, and her heirs after her, for the sum of 9,905 sicca rupees. The corresponding transfers were made in the Collector's registers. In 1224 the rajah went to a place called Baranagur, near the river Ganges, and there died. He left nine wives, of whom Ranee Dhukna, the plaintiff, was one.

The plaint set forth that the sale, on the 11th of Assun 1218 B. E. by Rajah Shebnath Rai, of the five mehals to Ranee Jugudumbha, was entirely fictitious; that in evidence thereof, the Rajah had, on the same date, taken from her an *ikrarnama* to himself, under his other name of Kasheenath Rai, (a) by which she renounced all right, under the deeds of sale; and this *ikrarnama* was produced on the trial; that in fact Rajah Shebnath Rai never did relinquish his possession of the property, but continued, up to the day of his death, to collect the revenues of the said mehals, of which he paid to Government the assessment on them, and expended the rest in the service of the idol. The plaintiff further asserted, that before her husband went to Baranagur he gave her written authority to adopt a son; in conformity with which she had adopted Koonwur Anund Rai, and that she now sued on his behalf for possession of the five mehals, which Ranee Jugudumbha ostensibly held under the deeds of sale, and in the Collector's registers. Exception was also taken against the rajah's competency thus to alienate endowed property, of which he was only the *shevait*.

The defendant replied, that the sale was *bona fide*, and not fictitious, and that the *ikrarnama* produced by the plaintiff was a forgery, and had never been executed by her; that *kharij-dhakil*, or a substitution of names in the record, had been granted by the Collector, and that her possession had been as complete as was compatible with her situation as a *purdah nusheen*; that her husband had necessarily conducted for her all the usual business of the estate, but that he had always faithfully accounted to her for the proceeds, and had required her signature to all important documents. She also declared, that under special power, granted her by her deceased husband, she had adopted a son, who was the rightful heir to the whole estate.

Ranee Hurree Pereea, another of Shebnath Rai's wives, adduced a similar claim for a person, whom she asserted that she had adopted under a legal *anoomatee putur*, granted her by her husband. At this stage of the proceedings Ranee Dhukna

(a) His *rasi* or astrological name. Besides the name, by which Hindoos are commonly known, and which is at the option of their parents, they have another name, the initials of which depend on the lunar asterism under which they have been born. Thus Kasheenath Rai must have been born when the moon was in the third *churun*, or quarter of the mansion called *mriga shivas*, or deer's head, as *ka* must be the initial letters of the name of all persons born under such an aspect. The latter name, however, is only used in astrological calculations, or in certain religious ceremonies, and not in the common transactions of life.

demised, and the suit was conducted by Bhowanee Purshad Chowdree and Bishonath Chunkdar, as guardians of Anund Rai, her alleged adopted son.

On the 16th of July 1823, the case came before W. T. Smith, First Judge of the Provincial Court, who decided that it was necessary for the plaintiffs first to establish the right of the minor to succeed to the estate; and therefore non-suited them.

On appeal to the Sudder Dewanny Adawlut, this order was set aside by Messrs. C. Smith and W. B. Martin, who directed the case to be again brought on the file, and tried on its merits; and, in event of the suit being well founded, judgment to be given in favour of the heirs of Rajah Shebnath Rai generally, and not the plaintiffs particularly.

Accordingly, on the 2d of May 1826, the case again came before Mr. E. Maxwell, Third Judge of the Moorshedabad Provincial Court, who considered the proof, adduced by the defendants to support the *bond fide* nature of the sale, as conclusive; and accordingly dismissed the suit, with costs to the plaintiffs.

The case was brought on appeal into the Court of Sudder Dewanny Adawlut, on the 15th of August 1829 before Mr. M. H. Turnbull, who gave judgment as follows: "The appellants assert, that the late Rajah Shebnath Rai, on the 16th of Assur 1218 B. S. made a fictitious transfer of the five disputed mehals to the respondent without consideration, that he executed deeds effecting this fictitious transfer, and had the corresponding alterations made in the Collector's registers. He died on the 24th of Magh 1224; and should the transaction appear to have been a mere fiction, the mehals would constitute part of the estate of the deceased, and devolve, with the rest of the property, on his heirs. The respondent, on the other hand, denies that the mehals constitute part of the estate, and pleads that they are her property, purchased with her *stridhun*. On consideration of all the circumstances, the mehals appear to me to have belonged to the rajah up to his death, and the transaction with the respondent to have been simply a fiction. The sale to the respondent, without any special cause assigned, when he had eight other *ranees*, appears improbable, and would lead one to suppose that he had some particular end in view, for the promotion of which he made a nominal sale, without receiving any consideration, and had the transfer made in the Collector's registers, himself keeping possession during his life time. It appears, besides, from the five deeds of sale executed by the rajah, as well as from other documents, that the five mehals paid a *sudder jumma* of 6,341 sicca rupees, and were sold for 9,905 sicca rupees, a very inadequate price for so valuable an estate, and in itself sufficient to throw a doubt over the reality of the sale. Supposing, however, the sale to have been *bond fide*, and that the price was actually paid, it would still appear to be legally null and void."

From a reference to the deed, dated 11th of Aughun 1209 B. S. executed by Rajah Ram Kishen Rai, in favour of his son, Shebnath Rai, which is the source from whence the title

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Bhowa-
nee Pur-
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dree and
Bishonath
Chunkdar,
v. Ranee
Jugdum-
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Lihowa-
nee Pur-
shad Chow-
dree and
Bishonath
Chunkdar
v. Ranee
Jugudum-
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of the latter, is derived, it is clear, that Ram Kishen Rai only gave his son the *shevayutee*, and that he appropriated the proceeds of the mehals, after payment of the government revenue, to defray the expences of the worship of certain Hindoo idols. Granting, then, that in this case it is not quite clear at what exact period the lands became *devwatur*, or who is the original appropriator of them, it is still evident, from the terms of the grant, under which they came into Shebnath Rai's hands, that he was only *sherait*, (and as such indeed he signed himself in the deeds,) and had no power whatever to alienate the land, so as to terminate the right possessed by the idols. Should then the rajah have acted beyond his competency, and sold the mehals, so that the name of the purchaser was substituted for the one of the idols, and the proceeds made over to the purchaser, the vendor's interest therein terminating, such a transaction can never be upheld conformably with the law, as laid down in the *shasters*. This is clear from the *vyavusthas* in former similar cases, and has been confirmed by the oral answers of the Pundit of the Court, to questions this day addressed to him. On these grounds, therefore, and because it appears from the documents in the case, that Rajah Shebnath Rai did retain actual possession of the mehals till the date of his death; the suit of the appellants appears to me just. I would therefore reverse the decree of the Provincial Court of Moorshedabad, and adjudge the disputed mehals to constitute part of the estate of the late Rajah Shebnath Rai, and, as such, to be claimable by his heirs.

The case next came before Mr. C. T. Sealy, who thought it expedient to require a written *vyavustha* from the Pundit of the Court. He accordingly directed all the documents in the case to be referred to the Pundit, and that he should reply to the following question. Supposing it to be proved, by the documents in the case, that the disputed mehals have been appropriated to defray the expences of the worship of certain idols, a fixed revenue being also payable to Government from them, can the *shevait* of such property sell them? According to the *shasters* current in Bengal, would such sale be valid and binding?"

Answer. "Whereas all the disputed mehals are the property of certain idols, although revenue be paid to the Government, the person who is denominated *shevait* can never be considered competent to alienate them by sale. Such sale, according to the *shasters* current in Bengal, is neither valid or binding. From the documents put into my hands it appears, that, previous to the sale in question, the disputed mehals had been appropriated under the following terms; viz. that the surplus proceeds of the estate, after payment of the revenue due to Government, should be expended on the worship of the *deities*. Hence it results, that the competency of the *shevait* extended no farther than to the superintendance of the worship of the *deities*, and the payment of the revenue to Government, and could by no means be strained so as to authorize his alienation of the whole estate, by sale or gift. Now, according to the *shasters*, the ruling power should annul all sales or gifts by incompetent persons.

Authorities.

1849.

Menu. (a) "Any evil-hearted wretch, who, through covetousness, shall seize the property of the gods or of brahmans, shall feed, in another world, on the offal of vultures." On which *Culluca Bhatta* comments as follows: "The property of the gods is that which is appropriated for the image, &c. of the *debtā*."

Menu. (b) "A gift or sale thus made by any other than the true owner must, by a settled rule, be considered, in judicial proceedings, as not made."

Catyayana. (c) "Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner."

This exposition of the Hindoo law appearing confirmed, by precedents, and every accessible source of information on the subject, Mr. Sealy expressed his concurrence with Mr. Turnbull, and accordingly reversed the decree of the lower Court, annulling the sale, and finally determining that the mehals constituted part of the estate of the deceased, Rajah Shebnath Rai, and must descend to his legal heirs. The costs in both Courts were made payable by the defendants. (d)

(a) *Menu* xi. 26. This text is adduced to prove, in connection with the gloss, that *dewutir* land is legally considered the property (*wam*) of the idol, and, as such, is subject to the laws which regulate the alienation of any other property.

(b) Vide book viii. c. 199.

(c) Colebrooke's Digest.

(d) The *vyavastha* in this case was given by the Hindoo law officer attached to the Court, Boudyanath Mir, a native of Tirhoot, but equally well versed in the tenets of the other schools of law which prevail in the districts subject to the Bengal Presidency, as in the peculiar doctrines of his native country. Much pains however was taken, in the present instance, to invalidate the law laid down by him, as at variance with the tenets of the Gour or Bengal school. For this purpose three *vyavasthas* were filed by the respondents, one signed by Ramchundur, a Pundit in the Government Sanscrit College, a second by thirteen other Pundits of the same College, and a third by thirteen Nuddea Pundits. The argument in all three was the same, but it was more acutely stated in the first, which it may be useful to examine more closely.

Question. A man separates certain villages from his estate, and appropriates them to defray the expences of the worship of certain idols. For some time he himself performs the worship, but subsequently authorizes his younger son to minister to the idols from the proceeds of this *khuajee* land, and shortly after dies. The son for some time continues to perform the worship, from the surplus proceeds of the estate, after payment of the Government revenue, but at length sells the land, drawing over deeds of sale in his own name, jointly with those of the idols. Is such sale valid, according to the *shasters* current in Bengal?

Answer. A sale of land paying revenue, which has been appropriated to certain idols, is valid, when executed by the *shastri* in his own name, conjointly with that of the idol, but with the following restriction. The seller possessed a recognized right of collecting the revenue on the land, and paying to the Government that portion which belonged to it, and exactly such right is what the purchaser acquired by his purchase; for the rights of the idol are not at all affected by the creation of this right in the purchaser, being altogether distinct therefrom. The case is similar to the sale of an estate by Government for arrears of revenue; the right of the purchaser by no means affecting the pre-existing right, whether of the Government or the *debtā*. Thus too the right of the seller was created by the gift of his father, and thus the right of his legal heir would have been created, had not this sale intervened. This doctrine is established in a Comment on the *Doya Bhaga*, written by *Sriyashna Tercalamega*, an author well versed in the *Mitachara*, whose works are current in Bengal. "A king having purchased some territory from another king, acquires in that territory a right precisely similar to that which was formerly possessed by the

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1829.

BURMDEONARAIN SINGH and others, Appellants

Dec. 12th.

versus
HURSHUNKERNARAIN SINGH, Respondent.

A public sale annulled, on the ground that villages, assessed at the decennial settlement as distinct mehals, in the names of different persons, though they may subsequently become the property of one and the same individual, cannot legally be sold to realize balances of Government revenue, as a single estate, unless an union of estates has been formally applied for and effected under section 6, reg. 25, 1793, and section 6, reg. 19, 1814.

THIS was a suit instituted by the respondent, Hurshunkernarain Singh, in the Patna Provincial Court, on the 22d of February 1825, to set aside the public sale of talook Tajpoor, and other villages, in satisfaction of balances of Government revenue. The action was laid at 50,100 rupees, the price realized by the sale.

At the formation of the decennial settlement, 1197 F. S. Sobnarain, the father of the plaintiff, and of his brother Lalnarain, was in possession of talook Tajpoor, &c. in purganna Bal, which was recorded in the Collector's office, as his ancestral estate, subject to a specific *jumma*. He subsequently purchased one moiety of mouza Ramgurh at auction, in 1203 F. S. and mouzas Chumariah and Dhamadeh in 1206 F. S. liable to distinct rates of assessment: and in 1212 F. S. obtained possession of the other moiety of mouza Ramgurh, under a mortgage, from Golaub Sahee and the other proprietors. No application was however ever made to the Collector, either by Sobnarain or his heirs, for incorporating the subsequently acquired property with the ancestral estate. The mortgage on half mouza Ramgurh had been paid off, and applications had been made by the plaintiff, and the heirs of Golaub Sahee, for a transfer of names, upwards of a year and a half before the sale took place. The Collector, notwithstanding, had sold all the above mehals as a single estate, in satisfaction of arrears of Government revenue, which had accrued on talook Tajpoor, to the amount of 1,079 rupees. The plaintiff, in consequence of some dispute with his brother Lal-

seller, such as the right of collecting revenue. He by no means acquires an absolute proprietary right, such as that resulting from inheritance or donation; for such absolute right already exists in that land, and the two would be incompatible, for it would be impossible to create a second co-existent similar right." Again, "No defect of the title of the purchaser or donee arises in land, situated within the limits of the territory thus transferred, for the right being already existent there is an effectual barrier to the introduction of another similar co-existent right."

From these passages in *Shrikrishna Tercalancara's* Commentary on the *Days Bhaga*, it is evident, that in a sale the purchaser acquires a right precisely similar to that formerly possessed by the seller. Again, in the *Mitakshara* it is laid down, "Property is temporal only, for it effects transactions relative to worldly purposes, just as rice or similar substances do. Besides the use of property is seen also among inhabitants of barbarous countries, who are unacquainted with the practice directed in the sacred code: for purchase, sale, and similar transactions, are remarked among them. Moreover, such as are conversant with the science of reasoning, deem regulated means of acquisition a matter of popular recognition." Proprietary right being thus shewn to arise from popular recognition, it follows that the *shrawat* possessed a separate and distinct right in this real property; for had it been otherwise, a perfect stranger might have collected the revenue, and performed the worship of the idols.

The sophistry in the above opinion evidently lies in declaring the alienation of the land itself valid, when the argument only legalizes the sale of the *shrawyat* rights.

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rain relative to shares, originally sued alone in the Sarun Zillah Court, (where his claim was dismissed,) to set aside the sale, as far only as it regarded his share of the property. On an appeal to the Patna Provincial Court, the First and Third Judges overruled the order of the Zillah Court; but, considering the claim for a partial annulment of a public sale to be irregular, non-suited the plaintiff, and directed him to bring a fresh action to upset the sale entirely, either in conjunction with his brother, Lalnarin, and the proprietors of half mouza Ramgurh, or, in the event of their refusing to join him, to make them defendants in the suit. The plaintiff now brought his action accordingly, and contended that the sale was illegal; first, because the villages sold as a single estate constituted, in reality, four distinct properties; secondly, because, on the day of sale, before the auction took place, he had tendered to the Collector the whole amount of the arrears, which was however refused, as proved in the Zillah Court by the evidence of eleven credible witnesses; and thirdly, because half of mouza Ramgurh, the property of other persons, had been sold as a part of his estate, whereas in reality he had no right or title therein; the mortgage having been paid off, and a transfer of names applied for to the Collector, a considerable time previous to the sale.

On the part of Government, and the auction purchasers, it was contended, that, on the death of their father, Sobnarain, Hurshunkernarain and Lalnarain had succeeded to the property, of which he was the registered proprietor, as a joint and undivided estate, the revenue of which had always been paid in the gross, without any distinction or specification of separate accounts; and that it was not the custom in the district of Sarun, on the acquisition of any fresh landed property to have it formally incorporated with the estate, of which a person might be in possession previously, though the whole was considered to constitute one single estate. Accordingly, on arrears becoming due from the plaintiff and his brother, the whole of their property in purganna Bal had been sold, and the sale was afterwards confirmed by the Board of Commissioners.

With regard to the allegations of the plaintiff, relative to the mortgage on half mouza Ramgurh having been redeemed, it was stated, that the deed of mortgage had never been produced in the Collector's office to be cancelled, as required by law; that Hurshunkernarain had applied for a transfer of names; but, as the estate was a joint and undivided one, the transfer could not be sanctioned, without the consent of Lalnarain, who, although called upon, had never expressed his concurrence. On the contrary, in the petitions he had presented for a division of the joint estate, he had always mentioned this very moiety of mouza Ramgurh as a part of the property to be divided, and the revenue assessed upon it was invariably paid with that of talook Tajpoor, &c.

The allegations of the plaintiff, with regard to his tender of the amount of the balance, for which the estate was advertised for sale, they denied. The sale was postponed till three o'clock in the afternoon, and the plaintiffs were repeatedly called on to pay the arrears: and, in consequence of their neglecting to do so, the sale

1829. took place.. The witnesses cited by the plaintiff, in support of his statement, were all his own dependants, and their evidence had been disproved by many respectable persons, who were present at and others, the time, and, from their position, better able to depose to what Hurshun had occurred.

Burmdeon Singh. • Lalnarain and the heirs of the late Golaub Sahee, who were nominal defendants in the present suit, confirmed the statement of the plaintiff; the former with regard to the mouzas in question forming four distinct properties, and the tender of the balances; and the latter with regard to the redemption of the mortgage on mouza Ramgurh, and the application for a transfer of names.

The Second Judge of the Patna Provincial Court passed judgment in favour of the plaintiff on the 1st of February 1826. He observed, that at the formation of the decennial settlement, in 1197 F. S. talook Tajpoor, &c. mouzas Chumariah and Dhanadeh, and mouza Ramgurh, were assessed as distinct estates, and at different rates. It was admitted by the Collector in his reply, that Sobnaraian was recorded as proprietor of them at different periods; and neither he or his heirs ever applied to incorporate the property subsequently acquired with the original ancestral estate. Under these circumstances it was clearly improper to sell the whole as a single estate, especially as the balances, when compared with the sum realized by the sale, were so inconsiderable, that the disposal of a part of the property would have been amply sufficient to satisfy the demand of Government against the proprietors. The mortgage, moreover, on a moiety of mouza Ramgurh, had been paid off, and application made for a transfer of names to the Collector's office, upwards of eighteen months before the sale: and consequently the property of other persons had been illegally sold for arrears due only from the plaintiff's estate.

In his letter to the Commissioner, under date 30th of May 1817, the Collector himself stated, that at the sale "Hurshunkernarain had a bundle, but whether it contained money or not was little to the purpose, as he refused to pay down the money until the sale of Tajpoor had actually taken place, and had not presented a chellaun." From this it might be inferred that the plaintiff had really brought with him the amount of his balances; and if the money was refused because he had not produced his chellaun, such a proceeding was improper, as the only use of a chellaun was to shew what was due, and this could be ascertained by reference to the *wasil bakee* papers, or the notification of sale. It was however unnecessary to call for evidence as to this fact; for whether the alleged tender of the money were proved or not, it would not affect the other informalities observable in the sale. The Board, moreover, in their letter of the 17th. of December 1817, to the Collector, regretted that, under the circumstances of the case, the sale should have occurred, and enjoined greater caution in future. He therefore annulled the sale, and awarded the plaintiff and his brother possession of their respective shares, on making good the amount of the balances for which the estate had been sold. The heirs of Golaub Sahee, &c. were awarded possession of half mouza Ramgurh, on reimbursing the plaintiff their proportion of the expences of the suit. Government were

declared liable for the costs of the plaintiff, and his brother Lal-narain, who in reality was a plaintiff in the case. The other defendants were ordered to pay their own costs, and the price realized by the sale to be refunded by Government.

Burmdeonarain Singh, Kishendeonarain Singh, Bishendeonarain Singh, and the heirs of Munbadh Sahoo, the auction purchasers, appealed to the Sudder Dewanny Adawlut.

Mr. M. H. Turnbull, before whom the appeal was first heard, recorded his opinion on the 19th of November 1829, that the judgment of the lower Court was, for the reasons set forth in it, perfectly proper and just, and must be upheld. The case however involved two points of a novel character, and which apparently had never been determined in a court of law. In the first place, the villages sold as a single estate were assessed at the decennial settlement in 1197 F. S. in the names of different persons, as four distinct and separate estates. Sobnarain, the respondent's father, was at that time only in possession of one of them, viz. talook Tajpoor, but subsequently obtained possession, at different periods, of the other three by purchase and mortgage, but no application was ever made to the Collector to incorporate them with his original estate. Notwithstanding this, the whole of them had been sold by auction, for arrears of revenue, although from the trifling amount of the balances, compared with the large price realized by the sale, it was evident that a disposal of a part of the property would have been sufficient to satisfy the claims of Government. In the next place, one moiety of mouza Ramgurh had been sold with the respondent's property, although the mortgage under which it had come into the possession of Sobnarain, the respondent's father, had been paid off, and an application made to the Collector for a change of names in the record, upwards of a year and a half before the sale took place. Under these circumstances he considered the sale to have been illegal, and would confirm the judgment of the lower Court, and dismiss the appeal. As, however, the case might hereafter be cited as a precedent, he thought it advisable that the final order should be passed with the concurrence of another Judge of the Court.

Mr. Ross, before whom the case was next laid, observed, that at the formation of the decennial settlement in 1197 F. S. talook Tajpoor, mouza Ramgurh, and mouzas Chumariah and Dhanadeh, were assessed as three distinct mehals. Sobnarain, who at the time was the proprietor of Tajpoor only, subsequently, at different periods, became possessed of the other two by purchase and mortgage. But as neither he nor his heirs had ever made an application for their union to the Collector, under section 6, regulation 25, 1793, and section 6, regulation 19, 1814, he was of opinion that the sale of all the three mehals in one lot, as a single estate, to realize arrears of Government revenue, was illegal. He therefore concurred with Mr. Turnbull in confirming the decree of the Patna Provincial Court, and dismissing the appeal with costs.

1829.

Burmdeonarain Singh
and others,
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- 3 A Zumeendar in Bengal sold part of his ancestral estate to his mother for her maintenance, on condition of her binding herself not to alienate the property, but leave it to his son on her death. Held, that such a transaction did not terminate the Zumeendar's right in that property, or bar the alienation of it, by him and his mother jointly, to the prejudice of the eventual heir. By the Hindoo law, current in Bengal, a son has no right in the ancestral property inherited by his father, during his father's life. 322
- 4 A woman, in exchange for a *chumpakulles* or necklace, gave half of her property to another person, on condition that the latter should not alienate it, but leave it, on her death, to two individuals named in the deed of conveyance. Held that the transaction, being a gift for a consideration, was, according to Mahomedan law, in reality a sale; that the conditions of the deed were not binding; and that, on the death of the vendee, the property would descend to her heirs, to the exclusion of the persons in whose favour those conditions were made. 334

5 According to Hindoo law, a minor cannot execute a lease, or enter into any other engagement: and a claim founded thereon will not lie against him or his surety, the transaction being void, *ab initio*. 339

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- 1 Held that the Courts are not at liberty to question the merits of a final decision passed by any authority having competent jurisdiction, whether on the allegation of such decision having been contrary to law or wrong as to the merits. The decisions here alluded to passed by the Patna Council in 1777, and by the Patna City Court in 1796. 137

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- 2 In an action for debt, the borrower pleads repayment and produces receipts on paper stamped six years after the date of their execution. Held that such documents were inadmissible, and claim adjudged for this and other reasons. 108
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- 2 The respondents had collusively created a fictitious *talook* in favour of the appellants, to evade a decree passed against them in another suit, and were now obliged to plead their previous collusion in bar to the suit brought against them for possession of that very *talook*. 341

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- 2 A woman, in exchange for a *chumpakullee*, or necklace, gave half of her property to another person, on condition that the latter should not alienate it, but leave it, on her death, to two individuals named in the deed of conveyance. Held, that the transaction, being a gift for a consideration, was, according to Moohummudan law, in reality a sale ; that the conditions of the deed were not binding ; and that, on the death of the vendee, the property would descend to her heirs, to the exclusion of the persons in whose favour those conditions were made. 334

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- 4 The widow of a Hindoo, who died without children, has the power of making a gift of a portion of her lots

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6 According to the Hindoo law, as current in Bengal, the gift of joint and undivided property to the extent of the donor's share is valid. 196

7 The mother and widow of a brahmin divided between them his property, consisting of *dewasut* land, and right of officiating in a temple, reserving to each the power of alienating her own share. Such partition invalid by the Hindoo law, in consequence of the incompetency of the parties; and a sale, executed by the mother on the strength of it, set aside. 337

west, a widow does not inherit the property of her husband, when held in coparcenary, but only when held in severalty. In the former case she is only entitled to maintenance out of it. 330

INHERITANCE UNDER MOOHUM-MUDAN LAW.

1 The heirs being a widow, a son, four daughters and three sons of a deceased son, the property will, according to the Moohummudan law of inheritance, be made into 192 shares, of which the widow will take 24, the son 42, each of the daughters 21, and each of the grandsons 14. 231

2 According to the Moohummudan law, the heirs being a son and daughter, the property will be made into three shares, of which the son will get two and the daughter one; and the sister being sole heir will take the whole property, being entitled to one-half as her specific share, and to the other half by the return. 247

3 The heirs being a widow, a son, and two daughters, the property should, according to the Moohummudan law, be made into thirty-two parts, of which the widow is entitled to four, the son to fourteen, and the daughters to seven each. 280

4 A woman, in exchange for a *chum-pakulie*, or necklace, gave half of her property to another person, on condition that the latter should not alienate it, but leave it, on her death, to two individuals named in the deed of conveyance. Held, that the transaction, being a gift for a consideration, was, according to Mahomedan law, in reality a sale; that the conditions of the deed were not binding; and that, on the death of the vendee, the property would descend to her heirs, to the exclusion of the persons in whose favour those conditions were made. 334

INHERITANCE UNDER HINDOO LAW.

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2 By the Hindoo law, a mother cannot alienate at pleasure an estate which she inherits from her son. On her death it goes not to her own heirs, but to the nearest surviving heir of her deceased son. 310

3 A Zameendar in Bengal, sold part of his ancestral estate to his mother for her maintenance, on condition of her binding herself not to alienate the property, but leave it to his son on her death. Held that such a transaction did not terminate the Zameendar's right in that property, or bar the alienation of it, by him and his mother jointly, to the prejudice of the eventual heir. By the Hindoo law, current in Bengal, a son has no right in the ancestral property inherited by his father, during his father's life. 322

4 By the Hindoo law, a daughter has no power to alienate by gift her ancestral property, to the detriment of the other heirs of her father. 330

5 By the Hindoo law, as current in the

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- 9 A *Mokurrere potta*, executed by a Zemindar in favour of the Collector's *dewan*, being declared void under Section 15, Regulation 2, 1798, the heirs of the *dewan* ordered to relinquish possession in favour of the heirs of the Zemindar, in consideration of their minority and other circumstances ; though the death of the Zemindar took place eighteen years before the institution of the suit. 130
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- 12 A woman was authorized by her husband to adopt an individual named ; or, in the event of any bar to his affiliation, any other brahmin's son. The individual named was adopted by her, and died some years afterwards. Held, that she was incompetent, under the terms of the authority given, to make a second adoption. 318

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- 1 In a suit to recover a debt, the Provincial Court awarded the principal with interest to the day of payment, provided such interest did not exceed the principal. The Sudder Dewanny Adawlut allowed the principal and an equal sum for interest, together with interest at 12 per cent. on that aggregate sum from the date of their decree to the day of payment. 95
- 2 Interest exceeding the principal may be awarded when the excess has accrued subsequent to recourse to law for the recovery of the debt. 261

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- 4 According to Hindoo law, a minor

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- 3 Claim for possession of an estate barred by the rule of limitation ; the adverse party having been in possession under a deed of sale upwards of twenty years. 87

MALIK MOKUDDIM.

- 1 Held that a suit will not lie against a *Malik* or *Malik Mokuddim* with whom the decennial settlement was concluded in Bhaugulpore, for *Chukladars* or *Chowdras* rights or fees. 126

MOKURRERE TENURE.

- 1 A *Mokurrere patti*, executed by a Zemindar in favour of the Collector's Dewan being declared void under Section 15, Regulation 2, 1793, the heirs of the Dewan ordered to relinquish possession in favour of the heirs of the Zemindar, in consideration of their minority and other circumstances, though the death of the Zemindar took place eighteen years before the institution of the suit. 130

MOHUMMUDAN LAW.

- 1 A will upheld by which a Moosilmunn female bequeathed the whole of her property to a stranger. The testatrix having no heirs, the legatee took the whole of her property. Had she left objecting heirs, two-thirds of the property would have gone to them, and one-third to the legatee. A Hindoo was appointed executor to the will. 24

- 1 A case of redemption of mortgage, under a deed of mortgage and conditional sale, the equity of redemption being saved by repayment of the money borrowed on the mortgage, within the period of one year from the receipt by the mortgagor of the notice to pay, issued under Regulation 17, 1806, as required in such notice. 5
- 2 In an action for the recovery of a debt due on mortgaged property, a third party appears and claims a large sum under a decision of the Sudder Dewanny Adawlut. - The Provincial Court awarded to plaintiffs a certain part of their claim ; after that was paid, it was ordered that the holder of the decree of the Sudder Dewanny Adawlut should receive what was due to him thereon, and that the plaintiffs should then receive the balance of their claim. The third party appealing to the Sudder Dewanny Adawlut, it was ordered that he should receive the whole of the sum due under the decree, before the plaintiffs were paid any part of their debt. 15
- 3 Claim to redeem a village from mortgage ; plaintiff allowed to recover half of the village by paying one half of the mortgage money ; that being the portion to which he was declared entitled by the law of inheritance, as heir to the original mortgagor. 32
- 4 In a suit to obtain possession of certain premises under a deed of *by-bil-wafa*, the mortgage having been foreclosed, and the sale made absolute ; it appearing that one rupee per cent. *per mensem* was the sum stipulated to be paid as interest in the deed of mortgage, but that the mortgagee had received a separate bond engaging the payment of an additional 1 per cent. interest, such a proceeding was held to be contrary to the provisions of Regulation 17 of 1806, and the claim was accordingly disallowed. 106
- 5 The validity of a transaction of *by-bil-wafa* is not affected by the fact of the parties not having come to a final adjustment of their respective accounts previously to the execution of the deed by the conditional seller ; neither is it affected (the term at the end of which the conditional sale was to be-

- comes conclusive being five years) by the fact of an excess above the legal interest having been received by the conditional purchaser in any one year; there being no trace of fraud to elude the law regarding interest. 111
 6 A lease granted in consideration of an advance of a sum of money held to be equivalent to a mortgage, and the lessee declared liable for such surplus proceeds of the estate as remained after he had realized his principal with interest. 251

OBLIGATIONS.

- 1 The treasurers of a Collector held responsible for a sum of money, said to have been stolen from the treasury under their charge. 1

PARTNERSHIP.

- 1 Action to recover profits of a partnership in trade entered into without any written agreement. According to the Hindoo law, though it is unlawful in Bramins to traffic, yet on closing their accounts they are entitled to their respective share of the profits of such traffic. 84

PILGRIMS.

- 1 The presents made by pilgrims of certain sects to any one of the Benares Gungapootras or conductors, must be divided equally among them all, according to the usage of the tribe. 123

PRACTICE.

- 1 The treasurers of a Collector held responsible for a sum of money, said to have been stolen from the treasury under their charge. 1
 2 The respondent repaired an embankment, whereby the land of the appellant was laid under water. On the suit of the latter, it appearing that the embankment was not in existence when the parties purchased their estates, the Sudder Dewanny Adawlut decreed that the embankment should be broken down, and awarded damages to the appellant. 8
 3 A claim to an ancestral estate dismissed under the Hindoo law of inheritance. The appellant having entered into an agreement with a person to give him up one half of the estate claimed by him if a decree should be passed in

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his favour, on consideration of that person's advancing the money required for the costs of suit: the Sudder Dewanny Adawlut held the transaction to be illegal, and ordered the agreement to be cancelled before they would admit the appeal. 12

- 4 In an action for the recovery of a debt due on mortgaged property, a third party appears and claims a large sum under a decision of the Sudder Dewanny Adawlut. The Provincial Court awarded to plaintiffs a certain part of their claim; after that was paid, it was ordered that the holder of the decree of the Sudder Dewanny Adawlut should receive what was due to him thereon, and that the plaintiffs should then receive the balance of their claim. The third party appealing to the Sudder Dewanny Adawlut, it was ordered that he should receive the whole of the sum due under the decree, before the plaintiffs were paid any part of their debt. 15

- 5 Claim by respondent for a moiety of an ancestral estate as heir to her deceased husband and his brothers: dismissed, as it appeared that her husband died before his father and brothers. She was declared entitled to maintenance only. 20

- 6 Claim to possession of lakhraj land dismissed, the quantity claimed being differently stated in a former summary suit, nine years having elapsed since the discontinuance of that suit, and the *tawad* produced in support of the claim not being deemed sufficient proof. 36

- 7 Claim to set aside a deed of sale dismissed; but the right of a third party declared to be not affected by the decree confirming the sale. 38

- 8 A will upheld by which a Moosulmann female bequeathed the whole of her property to a stranger. The testatrix having no heirs, the legatees took the whole of her property. Had she left objecting heirs, two-thirds of the property would have gone to them, and one-third to the legatees. A Hindoo was appointed executor to the will. The law officer of the Sudder Dewanny Adawlut declared that the Cazee might displace him, but that till regularly displaced, the whole of his official acts are valid. 49.

- 9 A case relating to the succession of an estate in the *Jungle Mohals*, wherein it was determined that, agreeably to family usage, the brother of a deceased childless Raja should take his estate to the exclusion of his widow. 57

- 10 The estate of a Hindoo awarded to the sons of his daughter, in preference

- to the grandsons by lineal descent in the male line of his full brother. 67
- 11 Claim to share in *Birt Makabrahmanes* dismissed; a review of judgment admitted on account of a suspicion that the Pundit, on whose *yuvudha* the special appeal was decided, had taken a bribe to induce him to give a favourable answer. But it appearing that his exposition of the law was correct, the judgment was confirmed. 70
- 12 A public sale of an estate set aside as illegal, no engagement having been entered into by the zamindar for the revenue of the year in satisfaction for the arrears of which the estate was sold. 81
- *13 Claim for possession of an estate barred by the rule of limitation; the adverse party having been in possession under a deed of sale upwards of twenty years. 87
- 14 Claim to a share of certain landed property dismissed; as, though the parties were descended from the same ancestor, it was probable the property had been alienated from the family and re-acquired by a different branch; and it not appearing that there was any trace of proprietary right or possession on the part of the claimants, since the Company's accession to the Deccan. 99
- 15 The Provincial Court having refused to admit an appeal *in forma pauperis*, on the merits of the case, and without reference to the question of pauperism, held that such order is final, and not open to a special appeal. 105
- 16 In a suit to obtain possession of certain premises under a deed of *byebil-wafa*, the mortgage having been foreclosed, and the sale made absolute; it appearing that one rupee per cent. *per mensem* was the sum stipulated to be paid as interest in the deed of mortgage, but that the mortgagee had received a separate bond engaging the payment of an additional 1 per cent. interest, such a proceeding was held to be contrary to the provisions of Regulation 17, of 1806, and the claim was accordingly dismissed. 106
- 17 In an action for debt, the borrower pleads repayment, and produces receipts on paper stamped six years after the date of their execution. Held that such documents were inadmissible, and claim adjudged for this, and other reasons. 108
- 18 The validity of a transaction of *byebil-wafa* is not affected by the fact of the parties not having come to a final adjustment of their respective accounts previously to the execution of the deed by the conditional seller; neither is it affected (the term at the end of which the conditional sale was to become conclusive being five years) by the fact of an excess above the legal interest having been received by the conditional purchaser in any one year; there being no trace of fraud to elude the law regarding interest. 111
- 19 Held that a suit will not lie against a *Malik* or *Malik-Mukkiddim*, with whom the decimal settlement was concluded in Bhaugulpoore, for *Chukladars* or *Chowdras* rights or fees. 126
- 20 Claim to certain lands dismissed; it appearing from the evidence adduced that the property was obtained in a *fursas* grant by the defendant's ancestor in the name of the ancestor of the plaintiffs. 134
- 21 Held that the Courts are not at liberty to question the merits of a final decision passed by any authority having competent jurisdiction, whether on the allegation of such decision having been contrary to law or wrong as to the merits. The decisions here alluded to passed by the Patna Council in 1777, and by the Patna City Court in 1796. 137
- 22 The respondent claimed to retain possession of certain lands on the plea of gift from a Hindoo widow, by whom they had been taken on her husband's death on a division among the heirs. Held that the plea was not proved, and that, at all events, the gift would have been invalid without the consent of the heirs. 143
- 23 The Courts are not competent to decide in a new suit, contrary to the provisions of a former final decree relative to the same property. The merits of that decree cannot be gone into. 146
- 24 Held that a stamp daroga is not responsible for any defalcation on the part of the subordinate stamp venders and their sureties. 149
- 25 In a claim to hold certain lands rent free, there being no *susam* and no proof of the lands having been held as *takhsir* since 1765, the Court rejected a document purporting to be an order from the Collector in 1787, on the grounds, either that it was a forgery, or had been obtained by fraud or misrepresentation. 155
- 26 Sale of joint landed property, situated in the district of Mirzapore, by one partner without the consent of the rest, set aside as being contrary to the Hindoo law, and there being evidence of over-reaching on the part of the purchaser. 158
- 27 In the case of an undivided Hindoo

- family, their acquisitions will be presumed to have been joint till proved otherwise; the *onus probandi* resting with the party claiming exclusive right. 162
- 28 In the absence of a bill of sale for landed property and receipt for the purchase money, the Court of Sudder Dewanny Adawlut held it necessary, that the fact of sale should be satisfactorily established, and, in the present instance, considering the proof adduced by the claimant (who was a servant of the alleged vendor, and probably in possession of his seals) to be insufficient to establish the sale, disallowed his claim. 168
- 29 The decrees of the Court below being reversed by the Sudder Dewanny Adawlut, owing to the proceedings in the Zillah Court not having been conducted agreeably to the regulations, it was ordered that the suit should be tried *de novo* on the original stamp fees. 173
- 30 Right of redemption adjudged to the seller of certain lands, on the ground of a condition to that effect in a separate deed executed by the purchaser, though the bill of sale itself was not worded conditionally. 174
- 31 On the forfeiture of a *putne* tenure for arrears of rent, the *durputne* tenures under it cease also; though the holders of them be not defaulters, and though subsequently to the default of the *sudder putneedar*, the Zamindar may have required them to pay their rents into his cutcherry. 179
- 32 Held that a proprietary claim to lands situated in Cawnpore is not cognizable, under Regulation 2, 1805, there not having been any possession on the part of the claimants or their ancestors for 38 years before the Company's acquisition of the provinces, and no claim having been preferred on their part at either of the three first settlements. 185
- 33 Held that the rule against taking cognizance of claims to land purchased in a fictitious name applies not only to the parties who engaged in the illegal transaction, but also to their heirs and others, where the illegal transaction forms the foundation of the claim. 188
- 34 Pottahs granted by the extensible tunction purchaser of lands, and confirming that at the end of ten years the rents should continue on the same terms, (it being then by the 4th regulation, 1795, not legal to grant a longer lease than ten years), held to be binding against the real purchaser and good against his claim to enhanced assessment at the end of the term, without, however, affecting the rights of Government, or any future purchaser of the whole parganas, in case of a public sale for arrears. 193
- 35 In a suit for funds fraudulently alienated by the manager as rent-free, since the Company's accession to the Dewanny, held that the rules relative to resumption of rent-free tenures do not apply. 208
- 36 According to the Mopohammedan law, in a gift of portable property to two persons, division is essential prior to delivery. Deeds of release founded on an invalid deed of assignment are not binding. Renunciation of inheritance in life time of ancestor null and void, claim to which may be preferred at any subsequent period without limitation. 210
- 37 Held that, since the perpetual settlement, a claim for *Makaddimes*, *Chowdras* or *Chukkades* dues, will not lie against any Zamindar. 215
- 38 In the case of an illegal resumption of two *mousas* which had been conferred as an hereditary rent-free tenure on the ancestor of the claimant before the Company's accession to the Dewanny, it was held by the Court of Sudder Dewanny Adawlut, that the claimant was entitled not only to the Government share of the rents but to the absolute possession of the lands, without reference to the proprietary right in whomsoever originally vested; the grant having been unlimited: although at one time a money payment had been made in lieu of it, apparently by consent of the grantee. 219
- 39 A claim preferred by any other than the original *Makurriadar* or his assignees, to share in the benefit of *mukarrere* tenures granted by Mr. Law in Zillah Behar, held to be inadmissible & coownership in the *mukarrer* originally not conferring title. 226
- 40 Held that the spirit of Section 27, Regulation 7, 1799, is applicable to entire estates or malks sold by auction, as well as to separate lots of an estate so sold; and that a Court of justice is no more authorized in the one case than in the other to direct any abatement in the amount of the annual *yameen* first. 233
- 41 Sale made by the administratrix of the real estate of an intestate held to be invalid, under the English law, at the suit of the son, who was declared entitled to recover possession, on repayment of the principal of the purchase-money. 243

- 42 The term of sixty years specified in clause 3, section 3, Regulation 2, 1803, held not applicable to a suit for lands in Allahabad, instituted upwards of twelve years after the date of the cession, the cognisance of which is prohibited by section 18, Regulation 2, 1803. 254
- 43 Interest exceeding the principal may be awarded when the excess has accrued subsequent to recourse to law for the recovery of the debt. 261
- 44 With a view to procure the execution of a decree passed in favour of the respondents, but which had been appealed to the King in Council, the appellant's father became surety for the ultimate award; in consideration of which he obtained from the respondents an engagement to pay to him the sum of 20,000 Rs., which sum was stated to have been borrowed from a third person on the credit of the appellant's father. The respondents failing to pay this sum at the time stipulated in their bond, the appellant was served with a notice that he would be sued for the same in the Supreme Court; whereupon he paid the amount. Held that in this case the respondents were liable to refund to the appellant the amount so paid by him, together with the charge for the notice, and this without reference to the fact whether the amount of the bond as actually realized by the appellant's father or not. 263
- 45 Lands held at an invariable quit rent by the appellants and their ancestors under *mohagreres potahs* for a period of thirty-eight years, held not liable to any enhanced assessment though the grants did not specify that the tenure should be hereditary. 271
- 46 Held that a *mohagreres* tenure confirmed at the decennial settlement by Government, when all the circumstances connected with the original grant were known, cannot be resumed on the ground of want of authority in the original grantor after an interval of twenty-eight years, during which time the rent had been paid at an invariable rate. 275
- 47 The rules contained in section 4, Regulation 6, 1793, for the award of fines cannot be considered applicable to the case of a person whose attendance may be required as a witness but on whom a summons may not have been served. 287
- 48 Held that the negotiator of a forged draft or bill of exchange, receiving the amount thereof, is liable to refund on a suit against him by the drawee; the payees named in the draft being unknown and the forgery proved. 290
- 49 An award greater than the sum sued for being given in the Zillah Court by a decree which was afterwards reversed in the Provincial Court, the costs in the latter made payable by the losing party only on the sum originally sued for. 293
- 50 Held by the Court of Sudder Dewanny Adawlut, that it is lawful for the zamindar to conclude a settlement with other individuals, for a *putnes tahok*, with the permission of the Zillah Court, the *sudder putnadar* having fallen into arrears; though his sharers, whose names were not recorded in the zamindaree records, had deposited their quota of the arrears in the treasury of the zillah; but they were declared at liberty to sue him for any damage they might have sustained by his default. 295
- 51 The appointment, by a Moscuman, of a Christian as his executor, does not invalidate a will containing such a provision, nor does the demise of that executor and the failure of the testator to appoint another in his place imply the annulment of the will. 301
- 52 A father, by two separate deeds, had sold all his property to his son, and made over to him the purchase money as a free gift. The provisions of the contract never having been carried into effect, and the sale being invalid under the Mahomedan law as of the kind denominated *Bye-i-Tujeeh*, it was held by the Sudder Dewanny Adawlut to be null and void. 307
- 53 Certain lands in Zillah Seharunpoor were claimed to be held rent-free, in virtue of two *sunnuds* granted by Madho Rao Scindia, one of which, dated 29 Zeekad, 27 Jules, conferred the Mouza in question as *muddud-mash* on Shah Abdoollah, and other fukeers, but had never been registered; the other, dated 8th Shaban, 32 Jules, confirmed the grant of the Mouza to Shih Abdoollah, Shah Hamid Collah, and other fukeers, and had been duly registered, but did not distinctly specify the nature of the tenure intended to be conferred. The Court of Sudder Dewanny Adawlut, finding that the Mouza in question was registered in the quinquennial register, as a *muddud-mash* tenure conferred by Madho Rao Scindia on Shah Abdoollah and other fukeers, on the 29 Zeekad, 27 Jules; and concurring with their law officers in opinion, that the intention of the grantor to confer a permanent tenure was clearly inferrible from the words

"and other fuksoos," which occurred in the sunnud dated in the year 33 Julus, and which had been duly registered; and adverting to the fact of the grantees and their descendants having enjoyed uninterrupted possession of the Mouza till its attachment on the part of Government upheld the claim, and decided that the lands were not liable to resumption and assessment. 312

54 By the Hindoo law, as current in the west, a widow does not inherit the property of her husband, when held in coparcenary, but only when held in severalty. In the former case she is only entitled to maintenance out of it. 330

55 The respondents had collusively created a fictitious talook in favour of the appellants, to evade a decree passed against them in another suit, and were now obliged to plead their previous collusion in bar to the suit brought against them for possession of that very talook. 341

56 A public sale annulled on the ground that villages, assessed at the decennial settlement as distinct mehals, in the names of different persons, though they may subsequently become the property of one and the same individual, cannot legally be sold to realize balances of Government revenue, as a single estate, unless an union of estates has been formally applied for and effected under section 6, Regulation 25, 1793, and section 6, Regulation 19, 1814. 348

PRESUMPTION.

1 Claim to a share of certain landed property dismissed; as, though the parties were descended from the same ancestor, it was probable the property had been alienated from the family and re-acquired by a different branch; and it not appearing that there was any trace of proprietary right or possession on the part of the claimants, since the Company's accession to the Deewanny. 99

2 The husband having sold a portion of land belonging to his wife, and the wife subsequently selling the same land to another individual, the first sale was upheld; though the consent of the wife is requisite to the transfer under the Moohummudan law, such consent being presumed in this instance. 259

3 According to the Moohummudan law, a man cannot legally have more than four wives living at the same time; and the fact of a woman's having

suffered 49 years to elapse since the death of her alleged husband, without advancing any claim, although many suits had been brought in this interval by the other heirs, was held to furnish strong presumption that she was not lawfully married to him. 283

PUTTNEEDARS.

1 Claim for a share of an ancestral estate adjudged; the rule of limitation not being applicable to the case of puttneedars deriving a share of profit. 91

RAZEENAMEH.

1 After a razeenameh had been filed the plaintiff pleaded that the execution thereof had been forced: but though repeatedly desired to prove his assertions, failed to do so. The Provincial Court dismissed the suit, and the Sudder Dewanny Adawlut confirmed the decision. 80

REDEMPTIONS.

1 A case of redemption of mortgage, under a deed of mortgage and conditional sale, the equity of redemption being saved by repayment of the money borrowed on the mortgage, within the period of one year from the receipt by the mortgagor of the notice to pay issued under Regulation 17, 1806, as required in such notice. 5

REGULATIONS.

1 A case of land confiscated on account of a serious affray between two claimants, under section 6, Regulation 9, 1793. 3

2 A case of succession to one of the tributary estates of Zillah Cuttack; decision in favour of the plaintiff by the Superintendent reversed and the claim dismissed, as being barred by section 4, Regulation 11, 1816. 39

3 In a suit to obtain possession of certain premises under a deed of hypothec, the mortgage having been foreclosed, and the sale made absolute; it appearing that one rupee per cent. per mensem was the sum stipulated to be paid, as interest in the deed of mortgage, but that the mortgagee had received a separate bond engaging the payment of an additional 1 per cent. interest; such a proceeding was held to be contrary to the provisions of

- Regulation 7, of 1806, and the claim was accordingly disallowed. 106
- 4 A *makurri* pottu executed by a Zamindar in favour of the Collector's Dewan being declared void under section 15, Regulation 2, 1793, the heirs of the Dewan ordered to relinquish possession in favour of the heirs of the Zamindar, in consideration of their minority and other circumstances, though the death of the Zamindar took place eighteen years before the institution of the suit. 130
- 5 Held that a proprietary claim to lands situated in Cawnpore is not cognizable, under Regulation 2, 1805, there not having been any possession on the part of the claimants or their ancestors for 38 years before the Company's acquisition of the provinces, and no claim having been preferred on their part at either of the three first settlements. 185
- 6 Held that the provisions of an Act of Parliament come into operation from the date only on which the regulation having reference to it is promulgated. 225
- 7 Held that the spirit of section 27, Regulation 7, 1799, is applicable to entire estates or mehals sold by auction as well as to separate lots of an estate so sold, and that a court of Justice is no more authorized in the one case than in the other to direct any abatement in the amount of the annual *jumma* fixed. 233
- 8 The term of sixty years specified in clause 3, section 3, Regulation 2, 1805, held not applicable to a suit for lands in Allahabad instituted upwards of twelve years after the date of the cession, the cognizance of which is prohibited by section 18, Regulation 2, 1803. 254
- 9 The rules contained in section 4, Regulation 6, 1793, for the award of fines cannot be considered applicable to the case of a person whose attendance may be required as a witness but on whom a summons may not have been served. 287
- 10 Under section 2, Regulation 43, 1795, Government are entitled, on the death of the grantee, to revenue and the Zameenadar to *malikang* only, from lands in Benares assigned in grants to invalid native officers previous to the formation of the decennial settlement. 304
- 11 A public sale annulled, on the ground that villages, assessed at the decennial settlement as distinct mehals, in the names of different persons, though they may subsequently become the property of one and the same individual, cannot legally be sold to realize balances of Government revenue, as a single estate, unless an union of estates has been formally applied for and effected under section 6, Regulation 25, 1793, and section 6, Regulation 19, 1814. 348
- RENT-FREE TENURE.**
- 1 Claim to possession of *lakhraj* land dismissed, the quantity claimed being differently stated in a former summary suit, nine years having elapsed since the dismissal of that suit, and the *widud* produced in support of the claim not being deemed sufficient proof. 36
- REVERSAL OF JUDGMENT.**
- 1 In a claim for *wasilaut*, the Provincial Court having awarded interest for the whole period (13 years) during which a separate suit for the lands was pending, and interest on that amount from the date of their own judgment, the Sudder Dewanny Adawlut reversed so much of the decree as regarded that interest, and awarded the principal of the *wasilaut* with interest from the date of the institution of the suit for *wasilaut* in the Provincial Court up to the date of the Sudder Dewanny Adawlut's decree, and from that date till payment should be made. 176
- RELIGIOUS ESTABLISHMENT.**
- 1 Held that the *Shewait* or superintendent of a religious establishment is not competent to grant a lease of the lands appertaining to the establishment for a longer period than his or her own life. 151
- 2 *Khirjee* land, appropriated to defray the expenses of the worship of idols, cannot be alienated by the *Shewait* so as to terminate the right of the idols in the net revenue. Such sale set aside, as inconsistent with the Hindoo law, current in Bengal. 343
- REVIEWS.**
- 1 Claim to share in *Birt Mahabrahmines* dismissed; a review of judgment admitted on account of a suspicion that the Pundit, on whose *yagnam* the special appeal was decided, had taken

a bribe to induce him to give a favourable answer. But it appearing that his exposition of the law was correct, the judgment was confirmed. 70

SALES.

- 1 A public sale of an estate set aside as illegal, no engagement having been entered into by the zemindar for the revenue of the year in satisfaction for the arrears of which the estate was sold. 81
- 2 Sale of joint landed property, situated in the district of Mirzapore, by one partner without the consent of the rest, set aside as being contrary to the Hindoo law, and there being evident over-reaching on the part of the purchaser. 158
- 3 A decree having been passed by the Patna Provincial Council for the restoration of an estate (which had been illegally sold) to one member of an undivided Hindoo family, on repayment of the purchase money, and it being presumable that the right of other branches of the family had always been kept alive, their respective shares were decreed to them without subjecting them to payment of any part of the purchase money, which, it was presumed, had been defrayed out of the produce of the joint property. 165
- 4 In the absence of a bill of sale for landed property and receipt for the purchase money, the Court of Sudder Dewanny Adawlut held it necessary, that the fact of sale should be satisfactorily established, and, in the present instance, considering the proof adduced by the claimant (who was a servant of the alleged vendor, and probably in possession of his seals) to be insufficient to establish the sale, disallowed his claim. 168
- 5 Right of redemption adjudged to the seller of certain lands, on the ground of a condition to that effect in a separate deed executed by the purchaser, though the bill of sale itself was not worded conditionally. 174
- 6 Pottahs granted by the ostensible auction purchaser of lands, and conditioning that at the end of ten years, the lease should continue on the same terms (it being then by the 44th Regulation, 1793, not legal to grant a longer lease than ten years) held to be binding against the real purchaser and good against his claim to enhanced assessment at the end of the term, without, however, affecting the rights of Government or any future purchaser of the whole parganna, in case of a public sale for arrears. 193
- 7 Held that the spirit of section 22, Regulation 7, 1799, is applicable to entire estates or mehals sold by auction as well as to separate lots of an estate so sold, and that a court of justice is no more authorised in the one case than in the other to direct any abatement in the amount of the annual jumma fixed. 233
- 8 Sale made by the administratrix of the real estate of an intestate held to be invalid, under the English law, at the suit of the son, who was declared entitled to recover possession, on repayment of the principal of the purchase money. 243
- 9 The husband having sold a portion of land belonging to his wife, and the wife subsequently selling the same land to another individual, the first sale was upheld, though the consent of the wife is requisite to the transfer under the "Mohummudan" law, such consent being presumed in this instance. 259
- 10 A father, by two separate deeds, had sold all his property to his son, and made over to him the purchase money as a free gift. The provisions of the contract never having been carried into effect, and the sale being invalid under the Mahomedan law as of the kind denominated *Baya-i-Tujesh*, it was held by the Sudder Dewanny Adawlut to be null and void. 307
- 11 A public sale annulled, on the ground that villages, assessed at the decennial settlement as distinct mehals, in the names of different persons, though they may subsequently become the property of one and the same individual, cannot legally be sold to realize balances of Government revenue, as a single estate, unless an union of estates has been formally applied for and effected under section 6, Regulation 27, 1793, and section 6, Regulation 1, 1814. 348

SECURITY.

- 1 The *dewan* of an agent for saltpetre having executed an engagement, making himself responsible for the fulfilment of their engagements by the contractors, who had received advances for the supply of that article, they having already furnished security, held that an action by the agent will lie against the *dewan*, without reference to the other sureties. 230

SETTLEMENTS.

- 1 Claim to hold an estate as zemindar in opposition to the person with whom the settlement had been made by Government: claim adjudged, but permission given to the opposite party to sue for the recovery of the estate under an alleged deed of gift. 24
- 2 Held by the Court of Sudder Dewanee Adawlut, that it is lawful for the zemindar to conclude a settlement with other individuals, for a *putnee talook*, with the permission of the Zillah Court, the *sudder putnees*, having fallen into arrears; though his sharers, whose names were not recorded in the zemindarie records, had deposited their quota of the arrears in the treasury of the zillah; but they were declared at liberty to sue him for any damage they might have sustained by his default. 295

STAMP DAROGHA.

- 1 Held that a stamp daroga is not responsible for any defalcation on the part of the subordinate stamp vendors and their sureties. 149

WIDOW (MOOSSULMAUN.)

- 1 A Moosulmaun widow held to be not liable for her deceased husband's debts, she not having derived any property from him. 161

WIDOW (HINDOO.)

- 1 The widow of a Hindoo, who died without children, has the power of making a gift of a portion of her late husband's property for his spiritual benefit; but such not appearing to the Court to have been the object of the gift in the present instance, the

claim of the donee was disallowed. Property which had devolved on a widow, at the death of her husband, without children, goes, at her death, to her husband's half-brother, to the exclusion of his maternal grandfather's brother's grandchildren. 117

- 2 The respondent claimed to retain possession of certain lands on the plea of gift from a Hindoo widow, by whom they had been taken on her husband's death on a division among the heirs. Held that the plea was not proved, and that, at all events, the gift would have been invalid without the consent of the heirs. 143

WIDOWS.

- 1 The widow of a sister's son (on whom the estate had devolved) takes the estate according to the Hindoo law to the exclusion of the sister herself. 47

WILLS.

- 1 A will upheld by which a Moosulmaun female bequeathed the whole of her property to a stranger. The testatrix having no heirs, the legatees took the whole of her property. Had she left objecting heirs, two-thirds of the property would have gone to them, and one-third to the legatee. A Hindoo was appointed executor to the will. The law officers of the Sudder Dewanee Adawlut were of the opinion that the Cuzee might displace him, but that till regularly displaced, the whole of his official acts are valid. 49

- 2 The appointment, by a Moosulman, of a Christian as his executor does not invalidate a will containing such a provision, nor does the demise of that executor and the failure of the testator to appoint another in his place imply the annulment of the will. 301

